

LEGATION ASYLUM IN AMERICAN
POLICY AND AMERICAN PRACTICE
OF INTERNATIONAL LAW:
EARLY PRACTICE AND CHANGES SINCE WORLD WAR II

By
RICHARD ALLEN FREDERICK

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INTRODUCTION

It is a curious fact that the right of legation asylum¹ is still practiced by states despite their almost universal agreement that it cannot be claimed under, or is not recognized by international law. On the other hand, international law does recognize the right (unaccompanied by any correlative duty) of states to grant territorial asylum to refugees.² An understanding of the interrelations of a number of seemingly unrelated factors and principles of international law helps to explain this paradox.

¹No examination will be made of asylum in warships for the basis of such asylum is very similar to that in legations. See Felice Morgenstern, "Extra-territorial Asylum," British Yearbook of International Law, XIV (1948), 253. Hereafter referred to as BYIL. Morgenstern notes: "There is stronger authority in favour of the view that warships are extraterritorial, and that there is thus, in respect of them, a legal basis for asylum." See also L. Oppenheim, International Law, ed. Hersch Lauterpacht (6th ed.; London: Longmans, Green and Co., 1947), p. 764, who regards a public ship as a "floating portion of the flag-state."

²Ann Van Wynen Thomas and A. J. Thomas, Jr., Non-Intervention (Dallas: Southern Methodist University Press, 1956), p. 391. See also U. S., Department of State Bulletin, III (1948), pp. 261-62, wherein Ernest A. Gross, the Legal Advisor of the State Department, in a letter to the Justice of the New York Supreme Court dated August 18, 1948, in regard to Mme. Kasenkina, a Russian school teacher who had sought asylum in the United States, stated that it had been emphasized to the Russian Ambassador that nations are obligated under international law to respect territorial asylum given to their nationals.

Just a few of the issues which have confused the problem include: the objectives of diplomacy, the fiction of extraterritoriality,¹ the sovereign status of states as the basis of international law, the right of states to grant territorial asylum, and the moral dictates of mercy to protect innocent human life from arbitrary justice.

For convenience states have customarily extended the privileges of freedom from local jurisdiction to foreign diplomats. Such personal immunity has also been extended to include the official residence of the diplomatic agent and the embassy or legation.² The concept of extraterritoriality has been used to describe the immunities due to the person of a diplomatic envoy. The transfer of personal immunity of the diplomat to include his official residence also included the concept of extraterritoriality being transferred to the residence. Under this concept of extraterritoriality diplomatic agents have claimed the right to grant

¹"Extraterritoriality" or "extraterritoriality" may be defined as the freedom from the law of the state and its judicial enforcement that would be enjoyed by an ambassador if he were not present in the country at all.

²See E. de Vattel, The Law of Nations or the Principles of Natural Law, ed. James Brown Scott, trans. Charles G. Fenwick (1758 ed.; Carnegie Institution; Washington: Gibson Brothers Press, 1916), III, 394. Vattel comments: "The independence of the ambassador would be very imperfect and his safety very uncertain if the edifice in which he lived did not enjoy a complete immunity and if it were not inaccessible to the regular officers of justice."

asylum to fugitives in their legations. Numerous grants of asylum have also been made in consulates under the same concept but based on capitulations in those countries that have been considered "uncivilized."¹ Since an examination of consular extraterritoriality is beyond the scope of this paper, it will be touched upon only in relation to its use by the United States for asylum in Latin America.

Sentiments of humanity have been a primary motivation for diplomats to extend the sanctuary of their legations to fugitives. Such asylum, however, removes an individual from the local jurisdiction to which he is normally subject, and is, in effect, a derogation of state sovereignty. The recent practice of also granting asylum for propaganda and information purposes leads to still greater confusion.

In usage there has been a tendency to differentiate between the reasons for which asylum may be granted. In modern times it is at least universally recognized that

¹For an excellent historical development of the system of consular jurisdiction and its relationship to extraterritoriality see Shih Shun Liu, Extraterritoriality: Its Rise and Its Decline ("Columbia University Publications: Studies in History, Economics and Public Law," Vol. CXVIII, No. 3 [New York: Longmans, Green and Co., 1925]); see also Chester Lloyd Jones, The Consular Service of the United States ("University of Pennsylvania Publications: Series in Political Economy and Public Law," No. 18 [Philadelphia: John C. Winston Co., 1906]) for the history and organization of the United States Consular Service.

common criminals, deserters, etc., will not be afforded asylum; only persons accused of "political crimes" under certain conditions may be granted asylum. This raises another problem--the need at times for diplomatic personnel to make qualitative judgments. It is readily apparent that such evaluations on the part of a foreign diplomat can give rise to serious complications. Domestic laws conflict; a unilateral decision to grant extraterritorial asylum may be interpreted as an attempt to meddle in internal affairs.

The United States has explicitly denied the right of legation asylum, but implicitly and in practice permitted it.¹ Thus the diplomatic correspondence in the United States Foreign Relations Reports cite numerous instances of asylum granted (as well as several instances when it was refused) within the past hundred years or so.² The

¹See Green Haywood Hackworth, Digest of International Law, II (Washington: Government Printing Office, 1941), 623. Hereafter referred to as Hackworth's Digest. A circular instruction sent out to its diplomatic officers in Latin America in 1930 by the United States held that the only purpose of immunity was to enable diplomatic agents to best represent the interests of their states. The United States Instructions to Diplomatic Officers of 1932 which defined diplomatic privileges and immunities from local jurisdiction denied the right of legation asylum, but did permit the use of the legation for temporary refuge.

²Foreign Relations of the United States, U. S., Congress, House, Executive Document (Washington: Government Printing Office, 1861-). Series to 1907 also entitled variously as House Executive Documents: Foreign Relations;

considerable usage of the right of legation asylum by the United States and other leading nations in the world has not, however, been accompanied by a conviction that the practice is in accordance with international law to an extent sufficient to evolve a customary rule of law. However, United States policy since 1945 has undergone a considerable change. In what respects has this altered her attitude toward legation asylum?

The object of this thesis, to sum up, is to survey historical and international aspects of the right of legation asylum with emphasis on the theory and practice of the United States. This will involve determining the reasons for the United States' position as well as any deviation from this position.

United States Diplomatic Correspondence; Papers Relating to Foreign Affairs of the United States; Message of the President and Foreign Relations. After 1907 became Department of State Publication entitled Foreign Relations of the United States. Hereafter referred to as For. Rel. (identified by date).

CHAPTER I

HISTORICAL BASIS AND DEVELOPMENT OF LEGATION ASYLUM

Introduction

The right of asylum is an ancient institution which originally meant exactly what it said--the right of a person to seek refuge in a privileged sanctuary. Such a place was protected from invasion either by superstition or positive law. Once a fugitive had gained the shelter of one of these sanctuaries he was in reality safe from pursuit with a protection that could not be violated.

Also dating from antiquity was the need for men (whether in tribes, city-states, or nation-states) to deal with each other. Consequently, rules and principles originally based on mutual convenience were developed and followed to facilitate the necessary diplomatic intercourse. One of the earliest canons was the inviolability of an ambassador and his subsequent immunities from local jurisdiction.

When these two ancient doctrines came together, the nexus resulted in a new doctrine--the so-called right of legation asylum. Individuals now claimed the right to seek asylum in the embassies of foreign countries, and foreign

countries claimed the right to grant such refuge. The new doctrine was subject to abuses on all sides, and as a result attempts were made by states and publicists to explain, justify, deny, or at least qualify this relatively new right of legation asylum. How did these two ancient principles develop? What new conditions in Europe brought about their union? What abuses occurred and why? And, finally, how did the publicists attempt to explain and limit the exercise of legation asylum? These are a few of the questions that this chapter will examine.

Pre-State System of the Right of Asylum

A recognised right of asylum was the outgrowth of ancient conditions wherein the principle of private vengeance was the law of man—"an eye for an eye; a tooth for a tooth." Under such an indiscriminate system it was only natural that sentiments of humanity and religion, as well as justice, should prompt the institution of places of refuge. With the gradual improvement in the administration of justice, places of refuge ceased to exist, but from long practice protection had come to be regarded as the fugitives' right. Increased intercourse among States brought about a better understanding of their rights and duties toward each other; and, subsequently, the right of the fugitive to claim protection devolved into the right of

the State to grant protection at its discretion--to extradite whomsoever came within its jurisdiction.¹

The Israelites are credited with being the first to systematically develop the institution,² although the right of asylum is known to have existed among the ancient Egyptians,³ and Moore says, "Indeed, in all the ancient world."⁴ Asylum was obtained initially, and until the sixteenth century primarily, under religious auspices. That is, under the ancients, refuge could be found by fleeing to a special city, a sacred statue, or a sacred altar in a temple. In Greece, suppliants were considered to be under the direct protection of Zeus, and express legislative measures insured the inviolability of the refugees. It was frequently insisted upon by the Greeks that altars

¹John Bassett Moore, A Digest of International Law (Washington: Government Printing Office, 1906), II, 757. Hereafter referred to as Moore, Digest.

²Charles J. Cox, The Sanctuaries and Sanctuary Seekers of Medieval England (London: George Allen and Sons, 1911), p. 1. The law given to the Levites reads: "These six cities shall be a refuge, both for the children of Israel and for the stranger, and for the sojourner among them; that everyone that killeth any person unawares may flee thither." Num. 35:15.

³Coleman Phillipson, The International Law and Customs of Ancient Greece and Rome (London: Macmillan and Co., 1911), I, 348.

⁴John Bassett Moore, "Asylum in Legations and Consulates and in Vessels," Political Science Quarterly, VII (March, 1892), 2. Hereafter referred to as Moore, PSQ.

afforded an asylum only for involuntary offenses, and not for intentional crimes. But so sacred were some of the temples that all who could obtain to their sanctuary were considered to be inviolable.¹

In ancient Rome before codification of the laws supplanted religious superstition, there is evidence that the practice of asylum was fairly prevalent. Phillipson tells of a remarkable instance, attested to by extant documents, in which Rome and twenty-four other states agreed that the town and territory of Teos would be sacred and possess the right of sanctuary.² In later periods of Roman history, as the application of law became all-pervading, the privilege of asylum was not too effective. A certain measure of refuge was, however, obtainable under the flag of the legions and the statues of the Caesars.³

With the replacement of pagan worship by the Christian faith, the custom of asylum was transferred to the Christian church. Cox believes that full protection to criminals and other fugitives within church walls was available following Constantine's Edict of Toleration in A. D. 303, and that such protection "was accepted as

¹Phillipson, pp. 349-51.

²Ibid., p. 354. The date of the agreement was 193 B. C.

³Ibid., pp. 356-57.

something more sacred and of greater value than the fitful asylum of temples and statues under the old imperial law."¹ From this point asylum was extended to the priests whose proximity could accord the privilege, and then to their dwellings.²

Stipulations were made both in pagan and Christian times as to the type of crime that might merit asylum. But the difficulty in differentiating between the classes of fugitives resulted in the general extension of asylum to all, and was one of the principal causes of violation. Generally, however, the inviolability of the place of refuge was effective. Not only did sacred sanction protect against violation of the right of asylum, but positive law existed to deal severely with those found guilty of this sacrilege.³

Following England's conversion to Christianity toward the close of the sixth century and throughout the Anglo-Saxon period, penalties for violation of church

¹Cox, p. 2. Cox states: "The earliest known Christian law concerning asylum in a church was enacted by Theodosius the Great in 392 to explain and regulate a privilege already recognized and well established."

²Ibid., p. 3. Cox notes a law of Theodosius the Younger made ca. 450 "whereby the limits of immunity were extended beyond the walls of the actual church to the walls of the churchyard or precincts, including the houses of bishops and clergy, cloisters, courts, and cemeteries."

³Phillipson, p. 353. See also Cox, pp. 6, 7.

sanctuary were reiterated in numerous law codes. However, a distinction was always made between "the King's peace, as answerable by penalties for securing the general safety of his subjects, and the Church's peace . . . whereby clemency and mercy were freely extended. . . ."¹ Under Norman rule conditions in the kingdom subsequently became more chaotic, and increased recourse to church asylum resulted in increased violation. Cox pointedly remarks, however, that "for every violation of sanctuary, there were hundreds of cases wherein its privileges were profoundly respected, and carried out after the accustomed fashion."²

The whole matter involved a perpetual conflict between the State and the Church--the Church concerned with mercy for all and the State with punishment of secular wrong-doers. The fourteenth and fifteenth centuries marked a great transition. So long as life remained hard and dangerous, the Church was able to persuade society of the validity of its point of view and its discipline. But society was changing and the Church was unable to rise to the occasion of the cultural, secular reorientation.³ Church

¹Cox, p. 6.

²Ibid., p. ix.

³James W. Thompson and Edgar N. Johnson, An Introduction to Medieval Europe (New York: W. W. Norton and Company, Inc., 1937), p. 690.

asylum decayed with the growth of the dynastic kings as opposed to the divine sense of kingship. Small respect was held for the immunities of the Church when they sheltered political enemies. The accession of Henry VIII in effect "determined that the religious element should be entirely blotted out from the idea and practice of special [*italics mine*] sanctuary."¹ Some small degree of immunity was still left to churches and churchyards, but it was expressly limited. Ultimately, in the last year of the reign of James I in 1625, even this was abolished with the revocation by Parliament of all forms of asylum in church or churchyard.²

The elimination of Church sanctuary did not mean that asylum was no longer needed, but rather that it would have to be found someplace else. Concurrent with the gradual decline in the efficacy of Church asylum in the fifteenth and sixteenth centuries, there arose the need for ambassadors to be established on a more permanent or resident basis. Since these public ministers had a certain amount of immunity, it was to their residences that recourse was made for asylum.

¹Cox, p. 326.

²Ibid., p. 329.

The Development of Diplomatic Immunities

Diplomacy developed as soon as groups of people needed to deal with each other on peaceful terms. International contact necessitated the mutual observance of regulations regarding individual conduct. Although rudimentary and subject to a great many exemptions in practice, the ancient Greeks and Romans, among other nations which preceded them,¹ recognized and observed on an "international" plane rules regulating their respective relationships.²

Two classes of rules existed: those based on unwritten moral principles obtaining their "force and juridical validity from the regular insistence of tradition and inveterate custom,"³ and those based on express compacts. Since early law and religion were inextricably interwoven--to disobey the law was to incur the wrath of the gods--

¹Arthur Nussbaum, A Concise History of the Law of Nations (rev. ed.; New York: The Macmillan Company, 1954), pp. 1, 2. Nussbaum tells of a documented treaty of peace, dating from 3100 B. C., between two Sumerian "states," the Lagash and the Umma.

²Phillipson, pp. 302-303. Nussbaum denies this thesis claiming that Phillipson is "not always reliable" because he is given to "rash generalization." This writer feels that Phillipson supports his generalities sufficiently to indicate the presence of an embryonic law of nations which is all that he is trying to do.

³Ibid., p. 58.

the early sanctions were based on religion.¹ Under the political genius of the more practical and realistic Romans, the natural law and the law expressed in conventions were removed from an exclusively religious basis, and placed more within a juridical framework.²

Among the many rules and customs that existed in antiquity and have become recognized and accepted in international law are those concerning ambassadors and embassies. These early diplomatic relationships, though not based on the institutions of permanent embassies as we know them, were developed to a highly comprehensive degree. The immunities and privileges that attached to a diplomatic envoy exemplified his special status as a personal representative of a sovereign. Such immunities as inviolability, freedom of communication, and exemption from the local jurisdiction formed an exception to the rule that all persons and things within a sovereign state were subject to its jurisdiction.³ Grotius states:

The common rule, that he who is in a foreign territory is subject to that territory, does,

¹Ibid., p. 44. Phillipson points out that in the Crito, Socrates is represented as laying down his life because the laws demanded it; disobedience would have been sacrilegious.

²Ibid., chap. iii.

³Ernest Satow, A Guide to Diplomatic Practice, ed. Neville Bland (4th ed. rev.; London: Longmans, Green and Co., 1958), pp. 174-76.

by the common consent of nations, suffer an exception in the case of ambassadors; as being, by a certain fiction, in the place of those who send them . . . and by a similar fiction they are, as it were, extra territorium; and thus, are not bound by the Civil Law of the People among whom they live.¹

Because ambassadors represented States which owed no allegiance to each other, the receiving States necessarily had to exempt visiting representatives from local jurisdiction. The rights and obligations of envoys were based on common usage and tacit understanding if not codified in treaties. Phillipson mentions the States of China, Egypt, and the Hindus of India as having, if not a code,² at least established ceremonies and formalities accompanying the interchange of embassies.

In Greece and in Rome the right to send, and consequently, the right as well as the obligation to receive ambassadors, was considered as an inherent right only of sovereign powers. The right was not an absolute, but one needing express recognition by treaty or special concession in the lack of one.³ But likewise, "the ius gentium

¹Hugo Grotius, De Jure Belli Ac Pacis, trans. and ed. William Whewell (Cambridge: University Press, 1853), II, chap. xviii, 209.

²Phillipson, p. 303. Phillipson cites "the Manava Dharmasatras" (the Institutes of Manu), the origin of which has been ascribed to different dates varying between 1200 B. C. and 200 B. C.

³Ibid., p. 309.

laid down that a hearing was not to be lightly denied to envoys, . . . [and that] in a case of refusal good cause must be shown."¹

Probably the most undisputed fact relating to ambassadors was their inviolability. It is not true, as Nussbaum points out, that "in ancient Greece it existed only under special conditions,"² for the Greek historians and other writers reiterate frequently the sacredness of heralds, ambassadors, and their suites in all matters regarding their office and duties.³ Thus when the Athenians and Spartans slaughtered a group of Persian envoys, the act was considered a transgression of the laws of the human race generally, and as such, the deed was subsequently atoned for. And in regard to the universal recognition and submission to such a general law "Xerxes . . . answered, on suggestions being made to him that he should resort to similar retaliation, that he would not be like the Lacedaemonians, for they had violated the law of all nations by murdering his heralds, and that he would not do the very thing which he blamed in them."⁴

¹Ibid., p. 311.

²Nussbaum, p. 5.

³Phillipson, pp. 328, 329.

⁴Ibid., p. 60.

Possibly the major factor involved in making the embassy and ambassador sacrosanct was its intrinsically religious character. Not only were law and religion one, but the earliest ambassadors were priests. This was outstandingly exemplified by the fetiales, a special group of Roman priests entrusted with administering the religious ceremonies pertaining to international matters such as war, treaties, legation, and extradition.¹ In addition, the ambassador was recognized as the personal representative of the sovereign and of the state he represented. An insult to the ambassador was thus tantamount to an insult to the state and could easily lead to war.

From the inviolability of the ambassador and his suite there followed the rule that ambassadors were not amenable to local jurisdiction. A strong feeling was held by all the ancient peoples that a person carried his own law with him. This was a development from the earliest times when all foreigners were considered barbarians.² A common system of law was based on an identity of religious beliefs. Since, as Liu points out, "the barbarian was

¹Nussbaum, p. 10. See also Phillipson, p. 97 and below.

²The Latin word barbarus from the Greek barbaros meant both "foreign" and "uncivilized." Webster's New Collegiate Dictionary (Springfield, Mass.: G. & C. Merriam Co., 1953), p. 70.

outside the pale of religion," he was "therefore incapable of amenability to the same jurisdiction to which the natives were subjected."¹ Phillipson states that:

Ambassadors [to Rome, and of course reciprocally] were exempt from the local civil jurisdiction as well as from the criminal jurisdiction. Their houses, however, were not held to possess such independence, and could not as a rule, legitimately furnish an asylum to criminal fugitives.²

Such were a few of the immunities from and limitations of territorial jurisdiction established in ancient Greek and Roman times. Although many of these principles needed to be expressed in treaties or granted unilaterally by sovereigns to the individuals involved on an ad hoc basis, their reciprocal value eventually made their express recognition superfluous. Through a liberal application of the principle of reciprocity these rules became firmly founded in international customary law.

All this changed with the breakup of the Roman Empire. International law became dormant with the general disintegration of law and order. During the several centuries of the Dark Ages and into the Middle Ages, Europe was ravished by innumerable bloody and incessant private

¹Shih Shun Liu, Extraterritoriality: Its Rise and Its Decline ("Columbia University Publications: Studies in History, Economics and Public Law," Vol. CXVIII, No. 3 [New York: Longmans, Green and Co., 1925]), p. 23.

²Phillipson, p. 337.

Wars or feuds. Through the efforts of the Church over the centuries there was a gradual restoration of a legal system in the form of ecclesiastical or canon law. Nussbaum declares: "The Church could not help recognizing the legitimacy of these bloody contests; it tried, however, to repress the evil as much as possible."¹ Among the ways it attempted to ameliorate warfare were the proclamation of "Truces of God" (days during which fighting was forbidden) and the establishment of various rules and principles to be observed during war. Violation of such rules could mean excommunication.²

Thus the Middle Ages had rules for the conduct of heralds or ambassadors in time of war, for the protection of those who declared war and those who tried to establish peace; it had canon law to safeguard clerical envoys who journeyed from country to country whether in the interests of Pope or King.³ A system of personal laws, having its origin in antiquity, also developed in medieval Europe. "In the absence of territorial sovereignty," Liu states that "racial consanguinity was treated as the sole basis

¹Nussbaum, p. 17.

²Ibid.

³E. R. Adair, The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries (London: Longmans, Green and Co., 1929), p. 264.

of amenability to law."¹ If to the privileged and inviolable character an ambassador or nuncio had as the representative of a sovereign prince or pontiff was added the personal law which accompanied early ambassadors to their residences, it becomes easy to understand how such agents began to claim excessive privileges of inviolability.

Society during the Middle Ages began to undergo radical economic and political changes. By the fourteenth and fifteenth centuries, new developments brought about the establishment of permanent embassies. As Schwarzenberger says, "International society had integrated to such an extent that international relations could no longer be conducted on the basis of occasional meetings between sovereigns or ad hoc embassies."²

Beginnings of Permanent Embassies

The development of commerce, which had received a considerable impetus from the Crusades, was more or less directly responsible for the establishment of permanent embassies.³ The Italian city states in the fifteenth

¹Liu, p. 26.

²Georg Schwarzenberger, A Manual of International Law (3rd ed.; London: Stevens and Sons Limited, 1952), pp. 45-46. Hereafter referred to as Manual.

³Prior to the fifteenth century the Popes had permanent agents at the courts of various kings, but these

century took the lead in the establishment of resident missions for the better negotiation of their international affairs which, at the time, were mainly commercial.¹ As early as 1469 Venice had established regular diplomatic relations with Burgundy, and ten years later she did the same with France. By the beginning of the sixteenth century Venice had similar relations with England; and England herself under Henry VII and Henry VIII had resident agents at several European courts, utilizing them for the transaction of a very considerable amount of purely political business. In return, other foreign countries, particularly France, Spain, and the Empire, had established resident ambassadors in London.² Permanent embassies were at first looked upon with suspicion and only slowly accepted because they were considered as merely a means to "facilitate spying."³ But by the seventeenth century permanent legations had become common, and were a normal means for diplomatic intercourse.

should not be considered as permanent embassies since they were concerned only with Church affairs. See L. Oppenheim, p. 688.

¹Lennox A. Mills and Charles H. McLaughlin, World Politics in Transition (New York: Henry Holt and Company, 1957), p. 194.

²Adair, p. 7.

³Mills and McLaughlin, pp. 194-95.

The Fiction of Exterritoriality and
the Right of Asylum

The Renaissance brought an end to what unity the feudal system had; the Reformation brought an end to what stability the Church had been able to achieve. The social upheaval resulted in far more savage conflicts than Europe had ever known before.¹ In an attempt to alleviate the devastating conditions of such war and to bring peace through unification of the numerous factions under one authority, a new doctrine slowly developed: the concept of absolute sovereignty.

The sixteenth century witnessed the gradual solidification of state territory and the emergence of the concept of territorial sovereignty. The result was an emphasis upon the supremacy of national law over all who dwelt within the territorial state, regardless of their nationality. The state's assumption of supreme and exclusive jurisdiction over all did not, however, attain perfection overnight. While the process was in a state of flux, ambassadors were able to take unto themselves privileges in excess of their legitimate rights of immunity.

A legal conflict thus ensued over the immemorial custom of ambassadorial immunity as opposed to the new

¹Adair, p. 264.

concept of absolute sovereignty. In the early stages of the development of permanent embassies, local sovereigns tended to treat envoys as they pleased, but this in turn meant that their own envoys were subject to the same treatment. "To apply the principle of diplomatic immunity in a narrow sense would have stultified the objects which the more regular intercourse between sovereign States was intended to serve."¹ The result was the gradual growth of the fiction of extraterritoriality.² As Adair cogently, if somewhat biologically, notes:

If the territorial law desired to be absolute at home, the territorial sovereign was no less anxious to repudiate the power of foreign law over his subjects when they were on his service abroad . . . and on the side of actual practice the well-established medieval idea that a man took his own law with him when he went to strange lands . . . prepared the way for the early inviolability of ambassadors to blossom forth into all the later flowers of extraterritoriality.³

It was a fairly simple, though slow, process to transfer the notion of the inviolability or personal extraterritoriality of the ambassador to his residence.

Schwarzenberger explains how the fiction came about:

Lawyers had to accustom themselves to the idea that, in the overriding interest of the smooth conduct of international relations, an exception to the rule of

¹Schwarzenberger, Manual, pp. 45-46.

²See Moore, PSQ, p. 10. See also Liu, p. 31.

³Adair, pp. 10, 11.

unlimited territorial jurisdiction had been made by the grant of such privileges to foreign diplomats . . . [and the exception was cloaked] in the disguise of extra-territoriality. . . .¹

The creation of the doctrine of extraterritoriality was an unconscious response to the difficulties of the times. Only under such a fiction could a king have reasonable intercourse with a republic, a Protestant state with a Catholic state, a Bourbon with a Hapsburg. The ambassador, sure of his privileged position, proved haughty; his suite safe in his protection were lacking consideration. But this was on the whole a small price to pay for the freedom from patriotic annoyance to which otherwise the foreign minister would have been exposed and which would have made peaceful international relations almost impossible.² Much more invidious was the further expansion of such diplomatic immunity.

In the unsettled times of the sixteenth and seventeenth centuries, all nations experienced growing pains in their new roles as sovereign states. Adair says that justice in the form of a judicial trial was often nothing more than "politics in a wig and gown," and the immunity an embassy could offer, "might well be serving the ends of a higher justice than the local courts purveyed."³ Under

¹Schwarzenberger, Manual, pp. 46-47.

²Adair, p. 265.

³Ibid., p. 227.

such conditions the immunity of the embassy could take on a new meaning and a new use--political asylum. And owing to the wide recognition that the idea of the inviolability of the embassy received during the sixteenth and seventeenth centuries, it often became in practice impolitic, if not impossible, to enforce the law against fugitives sheltered by the ambassador.

Adair points out, however:

That a criminal cannot be snatched by force from the embassy in which he has taken refuge may be an inevitable corollary of the doctrine of the immunity of the embassy, but that there is thereby created a right of asylum, that the ambassador thereby is legally endowed with the right to protect all criminals is a totally different thing.¹

This is, of course, what at first happened. It continued to happen until nations obtained a more complete knowledge and understanding of their rights and obligations. Since giving refuge to those seeking asylum could not be denied to the ambassador without damaging what rights were legitimately his, and since asylum had an obvious utility in such lawless times, the practice was tolerated. And because it was tolerated by governments, publicists felt they had to explain it. The need or desire to explain spurred on the development of the idea that the embassy was really an island of foreign territory within which the

¹Ibid.

local sovereign could have no jurisdiction. Although asylum had been recognized earlier under the principle of the inviolability of embassies, the more complete establishment of the concept of extraterritoriality gave added impetus to the practice of legation asylum.

Sir Cecil Hurst decried the fiction of extraterritoriality in no uncertain terms:

. . . [U]nfortunately in the writings of the publicists the word "extra-territoriality" in connexion with diplomatic immunities has been used to describe a theory, first put forward by Grotius, that the basis of diplomatic immunities was to be found in the principle that though physically present upon the soil of the country to which he was accredited, a diplomatic representative remained for all purposes upon the soil of the country which he represented.

As a popular explanation such a theory may for certain purposes be useful, but it is untrue in fact, it leads to absurd results and it has now been definitely repudiated by the more modern writers and by the decisions of the Courts.¹

It was not the privilege of immunity of domicile, under the fiction of extraterritoriality in and of itself, that caused such prejudicial opinion to be raised; it was rather the unreasonable extent to which the privilege was being successfully expanded beyond its original simple limits.

¹Cecil Hurst, International Law: The Collected Papers (London: Stevens and Sons Limited, 1950), p. 199.

Abuses of Asylum

During the seventeenth century immunity came to attain the most exaggerated proportions. Including not only the ambassador, his suite, and his dwelling, it was next extended to buildings over which he placed the arms of his sovereign. The process continued until, subsequently, there arose in various places such as Madrid, Venice, and Rome the fantastic claim of franchise du quartier, or freedom of the quarter, wherein the ambassador had extended his right of immunity to include the quarter of the city in which his residence was located.¹

The attainment of such extensive privileges did not occur overnight, especially in Spain. In 1601 when members of the French legation killed two Spaniards and then sought asylum in their embassy, the house was forcibly entered and the accused taken off to prison. On the protest of the French ambassador, the guilty official was sent to apologize, but the prisoners were not released. The ambassador was subsequently recalled, and trade relations were halted.² By 1671, however, the franchise du quartier had attained such proportions and gotten so out of hand that quarters of the city seemed to be in rivalry as to which committed the

¹Adair, p. 199.

²Ibid., p. 208.

worst atrocities and which secured the greater immunity from the police.

The King of Spain, in an effort to stop the criminal activities that were taking place under the protection of the ambassadors, finally declared that he would henceforth treat ambassadors at Madrid as his ambassadors were treated in other countries. In effect this would have considerably restricted the immunity previously permitted, for not only were officers of justice forbidden jurisdiction in the quarter, but Moore mentions a case in which the ambassador's permission was needed to even traverse the area:

. . . [I]n 1680 the Marquis de Villars, ambassador of France at Madrid, demanded and obtained satisfaction from the Spanish government because the mayor of the city, accompanied by his bailiffs, traversed his quarter without permission. The government, however, did not yield to the ambassador's request without a protest . . .¹

Despite his earlier statement Charles had yielded; though not for long. In 1684, the Spanish government very definitely notified all ambassadors that their exclusion from local jurisdiction in the future would apply only to their houses.

The situation in Rome was similarly bad. Sometime between 1647 and 1650 the French ambassador protested to

¹Moore, P3Q, p. 6.

the Pope when the Pope's Corsican guards removed from his coach some escaped prisoners. He had sheltered them in the French embassy and was attempting to get them out of the city. The Pope stated that there was nothing to prevent him from arresting them outside the embassy, but he was unable to deny to the French ambassador the right to use his embassy to protect criminals.¹

In 1660 the papal officer of the law was prevented by force from arresting for debt a trader who lived near the French embassy. Louis was most jealous for the rights and privileges of his ambassadors and would in no way see them abridged. The districts surrounding the foreign embassies and the embassies themselves were infested with criminals. In an effort to clear up the situation the Pope requested the various powers to renounce the franchise. By 1686 Poland, the Empire, Spain, England, and Venice had done so, but France very definitely refused. Adair notes the limits to which the French were willing to go:

The Pope had informed the various states of Europe that he would not receive an ambassador from any of them that had rejected his request for the abolition of the franchise. All the same Louis XIV appointed his new representative at Rome the Marquis de Lavardin, who arrived with an armed retinue with which he proceeded to surround the embassy in order to protect his privileges to the uttermost. The Pope refused to receive him, he became for all practical purposes excommunicate and a violent

¹Adair, p. 220.

controversy ensued, which ended in France's seizure of Avignon and the Venaisain and the imprisonment in St. Lazare of the papal nuncio in Paris; there he remained for eight months. Finally, Lavardin was recalled, the nuncio allowed to return to Rome, the Pope died and for political reasons the new French ambassador was instructed not to insist on the franchise du quartier.¹

Thus it was not until the French abandoned their claim in 1693 that the Pope could finally enforce law and order throughout the city.

In France, embassy inviolability, which the French were so insistent upon seeing enforced abroad, had gained sufficient weight for the English ambassador in 1623 to keep his house free of Christmas decorations. Henry IV admitted that the embassy was beyond his control, but he had the streets decorated as close to the house as was possible.²

The situation in England never did reach the proportions that it did in Spain and Rome, and recognition of the inviolability of the embassy residence occurred somewhat earlier. In 1563 English officers of the law invaded the chapel of the Spanish ambassador and arrested several non-members of the ambassador's suite. Although they were released after much delay and an apology was made, there was no admission on England's part at this time that they

¹Ibid., pp. 221, 222.

²Ibid., p. 208.

had been improperly arrested.¹ However, when thirteen years later Fleetwood, the Recorder of London, did the same thing to the Portuguese ambassador, he was sent to prison for his disregard of the legation's immunity. By 1586, when the French ambassador was suspected of harboring a wanted man, the surrounding houses were searched, but no attempt was made to enter the residence.²

This does not mean that there were no further violations. On the contrary, there were many. In 1635, a priest was pursued and captured inside the French embassy. When the ambassador demanded satisfaction for the violation of privileges, the priest was freed and the arresting officers were themselves arrested and punished. The House of the Florentine resident was broken into in 1641 by officers authorized to arrest Catholic priests. Again the action was hastily disavowed, the prisoner released, and the ambassador promised satisfaction.³

In 1642 the houses of both the French and Portuguese residents were broken into. In each case Parliament apologised for the actions.⁴ In 1645 the house of Lisola,

¹Ibid., p. 206

²Ibid., p. 207.

³Ibid., p. 215.

⁴Ibid., p. 216.

the Imperial ambassador in England, was broken into and sacked by parliamentary troops; Parliament offered compensation and the punishment of the offenders.¹

Such violations of ambassadorial immunity as occurred in England and elsewhere were primarily inspired by religious zeal or by a desire to apprehend those accused of crimes against the crown. But, as was pointed out previously by Cox, for every violation there were hundreds of occasions on which the right was observed.² And in 1624 when James I was petitioned by the House of Commons about English Catholics frequenting ambassadors' chapels, his reply indicated the considerable growth towards a proper recognition of the king's authority in such matters: "The houses of Ambassadors are privileged places, and . . . they cannot take them out from their houses";³ they could only apprehend the English Catholics when they left the embassy.

In regard to the immunity of the embassy, practice treated the ambassador with amazing generosity. It is probably correct to say that ambassadors established their

¹Ibid., p. 218.

²See p. 11, n. 2.

³Adair, p. 211. Adair quotes from S. P. Dom. James I, clxiii, 33, Apr. 23, 1624, King's speech to both houses.

immunities more as a result of political pressure than of any very strong respect for international law. But the fact that they were established was enough, for precedents made the law.

Opinions of Early Publicists

It was to Roman law, the common law of the "holy Roman Empire," (England's reasonably well-developed civil law could not be applied to international relations) that English and other writers and diplomats turned to find a frame of reference for the outstanding problem of the legal status of ambassadors.¹

It was no accident that on almost every aspect of the extraterritoriality of ambassadors the doctrines of jurists were less generous to the ambassador than the established precedents. The writers of the period were torn between two objectives. On the one hand there was the recognized need and desire to give the ambassador and his suite the inviolability necessary for the effective fulfillment of their mission. On the other hand was the desire to prevent the ambassador from thwarting the sovereign power of the State by offering asylum to fugitives. Such changes as came to pass in theory were almost invariably along the

¹Nussbaum, pp. 12, 74.

lines laid down by a steadily growing volume of case law.¹

Gentili was the first English authority to deal with the problem of ambassadorial immunity. In 1584 Mendoza, the Spanish ambassador, was involved in a plot to dethrone and kill Queen Elizabeth, replacing her with the Catholic Queen Mary of Scotland. England, faced with an immunity question of the highest importance, requested Gentili and other scholars versed in Roman law to give their opinion. The consensus was that Mendoza was protected by his immunity as an ambassador and should be returned home for any punishment. The judgment, however, was restrictive to the point that immunity held as long as the crime had not been carried into effect. In general the immunities of ambassadors were to be kept in narrow bounds. He did declare for inviolability of domicile, but not for any right of asylum.² Utilising not only the law of Nature and Roman law, Gentili took a considerable step forward in international law by using illustrative examples from the practice of States and by referring to contemporary opinions and events.³

¹Adair, p. 252.

²Nussbaum, pp. 74, 95. See also Adair, pp. 17, 18.

³Oscar Svarlien, An Introduction to the Law of Nations (New York: McGraw-Hill Book Company, Inc., 1955), p. 73.

Grotius, profoundly influenced by Gentili, started from a basic premise of an immutable law of Nature, but he also felt that the ius gentium or law of nations established by rules of custom and mutual consent was equally a part of international law. Grotius was the first to decide authoritatively in the fullest sense for the immunity of ambassadors accused of any crime. He based his decision, Adair says:

. . . on the evidence that such immunity is necessary and desirable . . . [because] the ordinary rule that he who is in a foreign country is subject to the law of that country suffers by the common consent of nations an exception in the case of ambassadors who by a fiction are, as it were, extra territorium and thus not bound by the law of the people amongst who they be.¹

As Nussbaum points out, Grotius, writing in 1625, was thus responsible for the introduction into international law of the fiction (not new in practice) "that the ambassador must be considered legally as outside the territory of the state to which he is accredited."² Both the phrase and the doctrine were subsequently generally adopted. On the question of whether or not the domicile of an ambassador has immunity he is silent, but he did stress that the embassy cannot afford an asylum for ordinary refugees from justice, unless it does so by permission of the

¹Adair, p. 28.

²Nussbaum, p. 111.

ruler of the country in which it is situated.¹

Richard Zouche was the next important legal authority and writer to appear on the international law scene. Although he considered Grotius an authority, he differed considerably from him by largely eliminating Natural law from the law of nations. For him custom--the practice of States in their mutual relations--was the basis of international law.² Zouche, as successor to Gentili as Oxford professor of civil law and a judge of the Admiralty Court, was faced with the same problem that had confronted Gentili.³ The English Government consulted him in regard to a sensational murder involving the brother of the Portuguese ambassador.⁴ As a result, he examined exhaustively the whole question of ambassadorial immunity and came to the same conclusions as had Grotius.

If the ambassador refuses to surrender . . . [members of his household] satisfaction should be demanded from the prince who sent the ambassador. . . . But as regards others, . . . [Grotius] says, the question whether an ambassador has the right

¹Grotius, II, chap. xviii, 216.

²Svarlien, p. 75. See also Nussbaum, p. 167.

³Svarlien, p. 75, n. 41, notes that "Civil law" in England at this time had reference to the law of nations."

⁴Nussbaum, p. 165. See also Adair, p. 54, who notes that "in regard to the case of Don Pantaleo de Sa (1653-54), he totally failed in his contention that he could claim any privileges as ambassador elect."

of asylum in his own house for any one who flees thither, depends on the grant of the prince to whom he is accredited. It does not exist by the Law of Nations.¹

With the advent of Bynkershoek, one of Holland's outstanding jurists, on the international legal scene, positive international law received yet an additional impetus. He, too, like Gentili and Zouche, was inspired by an actual case involving the seizure of an envoy's goods.² In determining the actual privileges and liabilities of ambassadors he turned completely to the customs and treaties of States. In examining whether the house of an ambassador could afford asylum, he agreed thoroughly with Grotius that such right was entirely dependant on the grant of the prince. "For . . . [the right of asylum] is not an institution of international law," he said, although "the ambassador and the members of his suite are inviolable; . . ."³

Bynkershoek held that the primary reason for ambassadorial immunity was founded on the desire of states

¹Richard Zouche, Juris et Judicii Feclialis sive Juris inter Gentes Explicatio, ed. T. E. Holland, trans. J. L. Brierly (Carnegie Institution; Baltimore: The Lord Baltimore Press, 1911), II, 100.

²Adair, p. 34.

³Cornelius van Bynkershoek, De Foro Legatorum, ed. James Brown Scott, trans. Gordon J. Laing (Carnegie Endowment for International Peace; Oxford: The Clarendon Press, 1946), p. 113.

not to destroy the efficacy of the embassy.¹ Therefore the ambassador, his suite, and everything connected with him was to be regarded as legally absent and subject only to the jurisdiction of his own sovereign. This exception to the ordinary legal rule was a fiction based on the tacit and express consent of nations.² Adair points out that despite his deprecation of any right of asylum in addition to his denial of any inviolability of residence, Bynkershoek's declarations for ambassadorial immunity based on extritoriality had a curious effect: they gave tremendous legal weight to the very doctrine that was furthering the right of asylum.³

Vattel, writing some thirty-seven years later in 1758, was a diplomat as well as an author, and his views on the subject of legation asylum may well be assumed to be in accord with existing practices. He reiterated the opinions of his worthy predecessors in pointing out that:

It is . . . for the sovereign to decide, when the occasion arises, how far the right of asylum, claimed by an ambassador for his house, should be respected, and if there is question of a criminal whose imprisonment or punishment is of great importance to the State, the sovereign should not be deterred by the consideration of a privilege

¹Ibid., p. 81.

²Ibid., p. 80 and above.

³Adair, p. 203.

which was never meant to¹ turn to the injury and ruin of the State. . . .

But he, nevertheless, did admit ameliorating factors:

It is true that when there is question of certain ordinary misdemeanors, committed by persons who are frequently more unfortunate than criminal, or whose punishment is of no great importance to the peace of the State, the ambassador's house may, indeed, serve as an asylum for them, and it is better to let certain offenders of this kind escape than to expose the minister to the frequent annoyance of having his house searched and to involve² the State in the difficulties which might result.

Vattel's opinion in the middle of the eighteenth century would seem to imply a lessening of the strong antagonism that had previously existed. That he would permit a certain amount of asylum indicates the practice must have diminished considerably both in its use and abuse.

Although they were not unanimous, a consensus of the major opinion of the period gave the ambassador, his suite, and his residence almost complete inviolability, but did not recognize a right of the ambassador to grant asylum within his embassy to criminals, political or otherwise. It must be remembered, however, that those who wrote on the subject did so at a time when the privilege was being unreasonably extended. More agreement was had on the subject

¹E. de Vattel, The Law of Nations or the Principles of Natural Law, ed. James Brown Scott, trans. Charles G. Fenwick (1758 ed.; Carnegie Institution; Washington: Gibson Brothers Press, 1916), III, 395.

²Ibid., p. 394.

of the franchise du quartier. Although it was tolerated in practice for a time, it was always as something to be claimed abroad and denied at home. Considered opinion held it to be thoroughly evil, and few tears followed its demise.

In actuality, practice was considerably in advance of theory, for when the ambassador had established the immunity of his residence on the basis of extraterritoriality, he could offer asylum with no legal way to dispute him.

CHAPTER II

TRANSITION IN THE USE OF ASYLUM; PRACTICES OF FOREIGN STATES

Introduction

During the eighteenth century asylum for both criminal and political offenders generally declined, and when it arose again in certain parts of the world its character had changed. Whereas originally asylum had provided a refuge for common criminals, sovereign states would no longer permit their police jurisdiction to be infringed upon. On the other hand, political offenders who had previously been denied the sanctuary of the embassy either legally or illegally were now considered the only persons to whom asylum could be given. What were the factors that contributed to this transition? What was its significance?

Generally speaking, by the end of the seventeenth century States had established that accredited diplomatic representatives were entitled under international law to certain well-recognized immunities from the local jurisdiction. These included, among others, the immunity of their official residences and offices from invasion by local authorities. The fiction of extritoriality came into being to explain this violation of sovereign jurisdiction.

But when the immunity of the embassy had become involved with the question of asylum, the problem became much more complicated. States mindful of the needs to send and receive envoys had tolerated the use of asylum so as not to damage the legitimate privileges of immunity. When the privileges of asylum claimed under the principle of extraterritoriality subsequently grew abusively large, then the principle itself was challenged by writers and fell into disrepute.

Following the Peace of Westphalia in 1648, which was instrumental in promoting political and commercial relationships among the sovereign European powers, there was a gradual but continual growth of the idea of justice through the administration of law. When judicial trials of common crimes had been secured, then obstruction of the ordinary course of the law was considered no longer permissible. A diminishment of the right of asylum, first in principle and subsequently in practice, was a partial result of that growth.

The systematic employment of asylum which in former times had obstructed justice and fostered political conspiracies was no longer tolerated by either public opinion or diplomatic usage. Moore notes:

Experience . . . taught that opposition to government may represent the spirit of anarchy rather than of liberty; that revolution can as readily destroy republics as monarchies; that elective

magistrates, constitutional rulers and hereditary despots may alike fall by the hand of the assassin.¹

Many writers have inferred that the views of Grotius and Bynkershoek on the question of the right of asylum were generally admitted into the practice of the states and that such violations of diplomatic asylum as the cases of Ripperda and Springer near the middle of the eighteenth century marked the termination of the right to grant asylum in Europe.² After Ripperda and Springer there was a noticeable abatement of all forms (criminal and political) of asylum, but the decline was slow and frequently interrupted.

It is not difficult to understand why the process of decline in the right of legation asylum was so gradual. Not only were the diplomats slow to relinquish the privileges they had obtained, but conditions resembling those of earlier times continued to crop up which occasioned its revival at certain times and places.

The latter half of the eighteenth century witnessed a new political principle which further confused the issue of the right of asylum--the right of revolution. Moore

¹John Bassett Moore, "Asylum in Legations and Consulates and in Vessels," Political Science Quarterly, VII (March, 1892), p. 21.

²See below.

notes:

The principle of liberty, enforced by the exercise of "the right of revolution" threw society into a violent ferment, in which the political offender, if not extolled as a hero, was regarded as falling within Vattel's category of "persons who often prove to be rather unfortunate than criminal."¹

By the nineteenth century one no longer heard of asylum for common criminals; it was for political refugees that it was claimed and tolerated. Thus the change in popular ideas that permitted a political offender to be extolled, and the growth in the administration of justice whereby governments refused to brook interference in the enforcement of their criminal law, resulted in a reversal of the role played by diplomatic asylum. Moore points out, as evidence of the correlation, "the cognate fact that political offenders who in former times were almost the only persons delivered up, are today exempt from the system of extradition that enmeshes the common criminal."²

An examination of some of the instances in Europe and the Americas from the beginning of the eighteenth century to the present will illustrate more clearly the progress in the administration of justice and the gradual decline of asylum and its transition from criminal use to political.

¹Moore, PSQ, p. 21.

²John Bassett Moore, A Digest of International Law (Washington: Government Printing Office, 1906), I, 205.

Immunity Established: Asylum
Declines

During the unsettled years of the civil wars in England and the Interregnum, lip service had been, as a general rule, paid to the immunity of the ambassador's residence. There was always, of course, the danger that such immunity would be violated by the demands of religious or political zeal. But with the Restoration and the gradual abatement of religious animosities, legation immunity soon became the accepted thing. By the end of the century an anonymous author, who served in the suite of the Spanish ambassador sometime during that ambassador's residence in London from 1680 to 1691, wrote in a work entitled Embajada Española the measures that could be taken to enforce the immunity of the embassy and the right of asylum:

If any official as has happened several times in London, should be so shameless as to enter the doors of the ministry to make an arrest, or in pursuit of a prisoner who has escaped from his hands and sought protection in the minister's residence, he should be handed over to the inferior servants who will be careful to requite the offence by putting him under the pump, if it is winter time, or by imprisoning him in the coal cellar on bread and water for twenty-four hours. Should any arrest be made within the boundaries of an ambassador's house, the minister may claim not only satisfaction for the infraction of his privileges, but may also demand that the prisoner should be brought and left upon the spot where he was captured.¹

¹E. R. Adair, The Extraterritoriality of Ambassadors in the Sixteenth and Seventeenth Centuries (London: Long-

Although governments do not always do as they would be done by, the available evidence seems to support the fact that, with the possible exceptions of persons accused of treason, foreign ambassadors in London could effectively offer asylum to fugitives by the end of the seventeenth and first half of the eighteenth centuries.¹ England at least twice during the first half of the eighteenth century upheld the immunity of the embassy in two outstanding instances.

The first instance was the well known case of the Duke of Ripperda in 1726. Ripperda, who was first a Dutch officer and Minister of the States-General at Madrid, and later became the Spanish minister of finance and foreign affairs to Philip V of Spain, fell into discredit. Fearing for his life he fled to the house of British ambassador Stanhope, who, after ascertaining that Ripperda was no longer a member of the government, assured him of asylum. Stanhope then informed the Spanish that Ripperda had important papers of state in his possession, and promised the Spanish government that he would not permit Ripperda to leave until he had given them up. The Spanish government, having demanded the surrender of the fugitive in vain, then

mans, Green and Co., 1929), p. 218. Adair cites Embajada Española (Camden Miscellany, xiv), p. 43.

¹Ibid., p. 219.

referred the matter to the Council of Castile which decided that Ripperda had been guilty of lèse-majesté and thus might be taken by force without infringing the privileges awarded to ambassadors, or violating the law of nations. The Council stated that it would:

Operate to the subversion and utter ruin [of sovereignty], if persons who had been intrusted with the finances, the power and the secrets of the state, were, when guilty of violating the duties of their office, allowed to take shelter under a privilege which had been granted to the houses of ambassadors in favor of only ordinary offenders.¹

Ripperda was therefore arrested within the embassy by armed force and his papers seized. The British government protested the action as a violation of international law and demanded reparation. The Spanish government refused any satisfaction, and the next year the two states drifted into war. When a peace treaty was signed in 1729, in Article I it was stated that there would be an "oblivion of all that is past."²

The other classic case that involved Great Britain was that of a Russian merchant named Springer, who in 1757, while domiciled in Stockholm, was convicted of treason against the King of Sweden. Just before being sentenced

¹Cited in Moore, PSQ, p. 13. See also Adair, pp. 223-24.

²Ernest Satow, A Guide to Diplomatic Practice, ed. Neville Bland (4th rev. ed.; London: Longmans, Green and Co., 1958), p. 219.

he escaped and gained admission to the house of the British ambassador. On the refusal of the British envoy to surrender Springer, the Swedish government surrounded the embassy with troops, and ordered the carriage of the envoy, when leaving the embassy, to be followed by mounted soldiers. The minister ultimately surrendered Springer under protest; but subsequently, under instructions from his government, he addressed a memorial to the King in which it was claimed as an "incontrovertible maxim" that the residence of an ambassador ought to enjoy the right of asylum so long as the right was not abolished by mutual agreement. Failing to receive reparations, the ambassador left Stockholm without taking formal leave. The Swedish government responded in kind by ordering its ambassador away in a like manner, and diplomatic relations were suspended for a time.¹

The immunity of the embassy was so generally recognized that seldom was it ever called in question. The right of asylum, although claimed and often conceded, was not universally recognized, especially, as was demonstrated in the above cases, when the safety of the state was at stake.

Within a century governments had stabilized sufficiently to offer effective protection to their citizens. As

¹Moore, PSQ, pp. 13, 14; see also Adair, p. 225; Satow, p. 220.

a result the author of Embassies and Foreign Courts,¹ published in 1855, stated quite emphatically that "in modern times the ambassadorial right of asylum, which gave rise to so many abuses, is abolished in all European states."

Briggs cites an interesting case which occurred in France in 1865. A Russian subject, one Nikitschenkoff, entered the Russian embassy in Paris and murderously assaulted the First Secretary, another Russian and two foreign employees who attempted to help him. Aid was requested from the French police who entered the embassy and arrested Nikitschenkoff. The ambassador's request that the prisoner be sent to Russia for trial under the principle of the extraterritoriality of the embassy was turned down by the French government. A contemporary comment on the case is worth quoting: "The fiction of extraterritoriality . . . has no other object than to assure to the foreign envoy the independence which is essential for the accomplishment of his mission."² The French Court stated in regard to the Russian contention of jurisdiction:

. . . All those who live in the territory [France] are subject to [French] police and security laws;

¹Cited in Moore, PSQ, p. 15; author's name not given.

²Herbert W. Briggs, The Law of Nations: Cases, Documents, and Notes (2d ed.; New York: Appleton-Century-Crofts, Inc., 1952), 788. Briggs cites G. Dutruc, Journal du Palais (1866), 51 ff.

. . . Admitting as exceptions to this rule of public law the immunity which . . . international law accords to the person of foreign diplomatic agents and the legal fiction in virtue of which the premises they occupy are deemed to be situated outside the territory of the sovereign to whom they are accredited . . . nevertheless, this legal fiction cannot be extended but constitutes an exception to the rule of territorial jurisdiction . . . The place where the crime which he is charged with committing cannot, in so far as he is concerned, be regarded as outside the limits of [French] territory; . . . It follows that the proceedings and the jurisdiction of the French judiciary are clearly established; . . .¹

The decision by the court in the above case demonstrates well the decline in the excessive privileges demanded by ambassadors and permitted by governments.² The Russian government was careful to request rather than demand the criminal, and the French government, with an effective administration of justice, would not hear of its criminal jurisdiction being abridged or its sovereignty limited unnecessarily. Satow cites a similar case that occurred in Berlin in 1880. The Berlin tribunal concurred

¹Ibid., pp. 787-88. Nikitschenkoff Case, France Cour de Cassation (Crim.), Oct. 13, 1865; see also Satow, p. 217.

²Ibid., p. 787. Briggs points out that Calvo, Le Droit International (3d ed.; 1880), I, sec. 571 (other writers apparently following him), asserted without citation of authority, that the Russian Government demanded the delivery of Nikitschenkoff for trial on "extraterritorial" grounds. Actually the Rapporteur, Bresson, in the Journal du Palais was speculating on whether the Russians could have formulated a claim for extradition upon the fiction of extraterritoriality. He answered his query in the negative.

with the Nikitschenkoff decision in regard to an offense committed in a foreign embassy at Berlin by a foreigner who was not a member of the mission personnel.¹

Opinions of Publicists

Although governments seemed to have a fairly clear idea of the limits of the fiction of extraterritorial sovereignty, some publicists, Moore says, still showed confusion when trying to reconcile it with a right of asylum. Lorimer, for example, whose Institutes of the Law of Nations was published in 1884, stands preeminent for his assertion of the theory of extraterritoriality. "An English Ambassador," he declared, "with his family and suite, whilst abroad in the public service, is domiciled in England, and his house is English ground."² But he rejected the consequences of a statement that would carry weight, by going on to say that an embassy could only furnish asylum for the minister, his family and his suite. This is the confusion that has characterized writers who have used the term loosely or figuratively. They have expressly or impliedly maintained the theory that the residence was actually a part of the territory which the minister

¹Satow, p. 217.

²Moore, Digest, II, 775. Moore cites J. Lorimer, Institutes of the Law of Nations (1884).

represents, then denied the correlative right of asylum that would necessarily have to follow.¹

Other writers have understood more clearly the basis upon which the inviolability of the embassy rested. Calvo, writing in 1885, took a more liberal attitude in regard to the right of asylum. He held that "in the midst of civil disturbances" a minister's dwelling can and ought to afford a safe refuge "to political persons whom danger to life forces on the moment to take refuge there." He also maintained that asylum in Europe and America had been respected to this extent. He did not, however, advocate extraterritoriality and he limited the inviolability of a minister's residence so:

The dwelling of a public minister is inviolable in so far as it affects things indispensable to his official service and the free and regular exercise of his functions; but whenever the conduct or the imprudent attitude of a diplomatic agent puts in peril the peace of the state, violates or tends to elude the law of the country by converting, for example, the legation into a refuge for criminals or into a habitation of conspiracy against the established government, the privilege of inviolability of domicile disappears, and the offended state is fully warranted in refusing to the dwelling of the agent the benefit of an immunity which reason and justice cease to sustain.²

¹Moore, Digest, II, 775. Moore notes that Foelix, Traité du Droit International Privé, I, 417, falls into this category as does Vattel, III, 395, though to a lesser extent.

²Moore, Digest, II, 777-78.

In the eighth edition of his book published in 1924, Hall took the same stand. Basing his opinion, as had Calvo, on the cases of arrest of Gyllenberg, the Swedish ambassador to London in 1717, and his fellow-conspirator, another Swede by the name of Gorts,¹ he said, in reiteration of Calvo:

It is agreed that the house of a diplomatic agent is so far exempted from the operation of the territorial jurisdiction as is necessary to secure the free exercise of his functions. It is equally agreed that this immunity ceases to hold in those cases in which a government is justified in arresting an ambassador and in searching his papers;--an immunity which exists for the purpose of securing the enjoyment of a privilege comes naturally to an end when a right of disregarding the privilege has arisen.²

Both Hall and Calvo failed, Hurst points out, in their attempts to limit the immunity of the ambassador and his residence in opposition to the fiction of extraterritoriality. They, like many other eminent writers of the nineteenth and early twentieth centuries, failed to distinguish between immunity from criminal jurisdiction and the

¹These cases are explained in detail in Adair, pp. 56, 61-66, who points out that Gorts was not entitled to diplomatic immunities, and Gyllenberg, on the King's claim that the action was taken in self-defense, was removed from the country. Actually, a great part of the King's motive was to instigate a war. See also John J. Murray, "Gorts-Gyllenberg Arrests," Journal of Modern History, XXVIII (December, 1956), 325-37.

²William Edward Hall, A Treatise on International Law, ed. A. Pearce Higgins (8th ed.; Oxford: Clarendon Press, 1924), p. 231.

temporary application of restraint by the local authorities.¹ Their opinions failed to take sufficient account of State practices.

Moore cites an impressive array of eminent publicists who agreed that "if the minister abuses his immunity by affording asylum to the enemies of the government, the sovereign may have the house of the minister surrounded, and may even take the accused by force."² He says:

Vattel entirely approved the action of the Spanish Government in the case of Ripperda. . . . The same opinion is expressed by the Spanish juriconsult, Riquelme, and by Phillimore. . . . [Also] in accord with this view are G. F. de Martens, Baron C. V. de Martens, Klüber, Heffter, Pinheiro-Ferreira, Bluntschli, Burlamaqui, Eschbach, Wicquefort, Wildman, Woolsey, Halleck, Wheaton, [and] Field. . . . Twiss refers to the "fiction of extraterritoriality," and says that an ambassador's house cannot be converted into an asylum.³

The general consensus of opinion shows the extent to which thought had progressed away from the former concept of relatively unrestricted extraterritoriality. When conditions had reached the point where such retribution as might be taken against a defeated political opponent was unlikely to be decreased by any measure that a foreign

¹Cecil Hurst, International Law: The Collected Papers (London: Stevens and Sons Limited, 1950), p. 218.

²Moore, Digest, II, 775. Moore cites Bello, Principios de Derecho Internacional (ed. 1883), 332, 381, n. 111.

³Ibid., pp. 775-76.

ambassador would be willing or able to employ, the right of asylum in the more settled communities of the civilized world was abandoned as an unnecessary and detrimental abuse of privileges.

Although he considered the practice of legation asylum generally objectionable, Sir Cecil Hurst deprecated the tendency among many writers "to regard the basis of diplomatic immunity as an agreed exemption from the jurisdiction of the country so far and only so far as may be necessary to enable the diplomatist to carry out the duties of his task."¹ It was Hall's considered opinion that such was the case. He said:

In Europe . . . it has been completely established that the house of a diplomatic agent gives no protection either to ordinary criminals or to persons accused of crimes against the state.²

His statement is perhaps too sweeping despite the limited qualification he adds in footnotes that "the practice in Central and South America is exceptional,"³ and "the exceptional survival or recrudescence of the practice in Spain, and the isolated case of Greece in 1862, do not seem to me to be sufficient to impart vitality to the custom elsewhere."⁴

¹Hurst, pp. 231, 272.

²Hall, p. 233.

³Ibid., p. 233 n.

⁴Ibid., p. 234 n.

Oppenheim makes the same assertion. He says that during the nineteenth century "all remains of this so-called right of asylum vanished, and when in 1867 the French envoy claimed it, the Peruvian Government refused to concede it."¹ He also qualified his statement somewhat in a footnote with references to the practices of South American states, but he claims "the right is not based upon a rule of international law, but merely upon local usage."²

Although it may be true that the right is not based upon international law, Oppenheim is either overlooking or disregarding instances in which asylum has been granted in the nineteenth and twentieth centuries, other than in South America. Greece, Bulgaria, Persia, China and particularly Spain, have all seen grants of asylum.³

Hurst notes in regard to such explanations:

Writings of learned authors of treatises on international law . . . are apt on occasion to set out what they feel ought to be the rule followed by governments, rather than the rule which is followed, and not to pay sufficient attention to the practice of States as exemplified in the rules to which it is the habit of governments to conform

¹Oppenheim, p. 712.

²Ibid., p. 712 n.

³William McHenry Franklin, Protection of Foreign Interests: A Study in Diplomatic and Consular Practice (U. S. Dept. of State Publication No. 2693; Washington: Government Printing Office, 1946), pp. 15, 120-21.

and to the decisions in cases which come before the courts.¹

Moore states that "since the practice of asylum is not sanctioned by international law, it can be defended only on the ground of the consent of the state within whose jurisdiction it is sought to be maintained."² Such a statement has most interesting repercussions if extended slightly, and is an exemplification of the reason the whole question of legation asylum is still unsettled: it is the consent of states, either implicitly through custom³ or explicitly through treaties, which forms the basis of international law. Although as Svarlien emphatically points out: "It should be understood . . . that custom as a source of international law must not be confused with mere frequency or habit of conduct."⁴ The question is how much frequency of use is necessary to establish custom.

The next sections will examine the usages of states, and the grounds upon which they attempted to base their practice of the right of asylum.

¹Hurst, p. 172.

²Moore, Digest, II, 779.

³Oscar Svarlien, An Introduction to the Law of Nations (New York: McGraw-Hill Book Company, Inc., 1955), p. 66. Svarlien cites John Westlake, International Law (2d ed.; Cambridge: University Press, 1910), I, 14.
"Custom is that line of conduct which the society has consented to regard as obligatory."

⁴Svarlien, p. 66.

Cases Involving Asylum or Exterritoriality

A revolution occurred in Greece in 1862, and British Foreign Office records state that effective refuge was granted both in legations and in consulates to those in danger of their lives.¹

In 1927, the Chinese Government wished to search part of the premises of the Soviet embassy in Peking. Having asked for and obtained permission from the diplomatic corps to enter the reserved quarter, the troops employed exceeded the terms of the permission. The Powers demanded that the offenders should be tried, and the doyen of the diplomatic corps received assurance from the police prefect that this would be done.²

In 1928, a case came before the Supreme Court of Hungary involving one Zoltan Sz., who had fraudulently obtained a passport from the Hungarian legation at Vienna. The Court maintained that the premises enjoyed the privileges of extraterritoriality and were therefore Hungarian territory; consequently, all acts committed therein must be judged according to the rules of Hungarian law.³

¹Moore, P3Q, p. 16.

²Satow, p. 224. Satow cites Yoshitomi, Révue Générale de Droit International Public (1928), 184.

³Satow, p. 217. Satow cites Annual Digest (1927-28), Case No. 252.

In 1923, a man claiming to be a Nepalese was arrested in Tibet for an offense against the law. He escaped from jail and took refuge in the Nepalese legation, whereupon the Tibetan police entered the embassy and forcibly removed him. A serious dispute arose between the two governments over the violation of legation immunity. The matter was finally terminated by a letter of apology from the Tibetan Government which the Nepalese Government accepted.¹

In 1895 the British Embassy at Constantinople gave refuge to a former grand-vizier and his son.² The immediate surrender of the two men was demanded by the Sultan, but the British Ambassador, backed up by the entire diplomatic corps, refused to hand over the two refugees. The Sultan finally gave formal assurances in writing that he would permit his former official to live safely anywhere in the Turkish capital. Upon receiving these assurances, the grand-vizier left the embassy.

Hurst tells of a curious custom in Persia called "bast," whereby shelter is taken in a foreign legation as a means of asserting grievances against the government.

¹Satow, p. 215.

²Graham H. Stuart, American Diplomatic and Consular Practice (2d ed.; New York: Appleton-Century-Crofts, Inc., 1952), p. 247.

Because certain principles of courtesy prevail in the country, it is impossible to deny hospitality no matter what inconveniences may result. "A former British Minister, Sir Mortimer Durand," Hurst notes, "related an amusing story of an intended invasion of the British Legation at Teheran by persons who proposed to take bast."¹

During the life of Shah Nasr-al-Din a negro slave came riding into the legation grounds one day and informed the minister that the whole of the Shah's harem, some 300 in number, were coming in an hour or so to take bast at the legation. The Shah had announced his intention of marrying the sister of one of his existing wives, the daughter of one of his gardeners, and this affronted the ladies. They were unanimous in objecting to the proposed marriage, and they had made up their minds, if His Majesty persisted in his intention, to leave the Palace in a body and migrate to the British Legation.

There was nothing the Minister could do except make such arrangements as were feasible. He bought a flock of sheep and the contents of a baker's shop and erected in the garden such tents as were available. Fortunately at the last moment when the ladies had already entered their carriages, the Shah gave way and the British Minister was spared the visitation.²

A desire for constitutional reforms caused the most noteworthy example of bast. In July of 1906 some thirty or forty members of the clerical and mercantile classes took bast at the British legation. The number

¹Hurst, p. 246.

²Ibid. See also Satow, p. 225, for the story in the minister's own words.

steadily increased, as the Persian government refused to take any action, until by August 2 there were fourteen thousand merchants taking bast in the legation. Ultimately the grand-vizier resigned, reforms were granted, and amnesty was given to all who had taken bast. Hurst points out, however, "that this immense crowd of persons took bast at the legation, not as fugitives from oppression, but solely as a means of compelling the Persian Government to satisfy their grievances."¹

Another curious case of asylum is mentioned by Stuart. In 1926 the Estonian Envoy to Moscow, A. A. Birk, made certain accusations against both the Estonian and Soviet authorities and then disappeared from his legation. Eventually he turned up at the Norwegian embassy and requested asylum. Stuart does not say whether asylum was granted, but merely states that "the question was ultimately settled by the dismissal of the Estonian Minister and the appointment of a substitute."²

British Practice in Spain and Latin America

Revolutionary movements in the various capitals of Europe during the nineteenth century were bound to produce

¹Hurst, p. 275.

²Stuart, p. 247.

"incidents" for a country like England which was so often, as Butler and Maccoby remark, "a patron of liberalism wherever it showed itself."¹ During constitutional struggles ex-officials and ex-ministers were only too glad to seek refuge in a friendly embassy, nor was this generally refused.²

For more than a decade prior to 1850 Spain was in a chronic state of revolution. Asylum was not only practiced extensively, but was for the most part observed. The transition regarding those persons a State considered eligible to obtain refuge now became very evident. The change in popular opinion in regard to revolutions permitted political offenders to come within the meaning of those Vattel referred to as "more unfortunate, than criminal."³

In 1841 the Chevalier d'Alborgo, Danish Chargé d'Affaires in Madrid, gave effective asylum to the leaders of a conspiracy involving seizing the Queen in her palace and taking over the government of General Espartero.

¹Geoffrey Butler and Simon Maccoby, The Development of International Law (London: Longmans, Green and Co. Ltd., 1928), p. 92.

²During the persecution of the Jews in Moldavia, Wallachia and Servia in 1867, under cover of the laws relating to vagabondage, the British Consul at Golatz made it known that asylum could be found in the British Consulate in case of need. Cited in Moore, PSQ, p. 16.

³Vattel, p. 394.

Similarly, in 1843 the Marquis of Casa Irujo, later to become Duke of Sotomayor, fell into disfavor and found refuge in the house of the same diplomat. So also did Senor Salamanca, who allegedly corresponded with and provided funds for one General Narvaez to pay the insurgent forces under his command. When the revolution was finally brought to a successful conclusion in 1846, d'Alborge was made a Spanish noble with the title of Baron del Asilo.¹

A new insurrection broke out in 1848, however, attended again with the greatest confusion. All constitutional guarantees were suspended; the civil tribunals were replaced by a council of war; arbitrary arrests were made; the streets of Madrid became the battle sites; and the houses of the foreign ministers soon filled with refugees. Within a short time after the outbreak of hostilities, the Duke of Sotomayor requested the recall of the British ambassador, Mr. Bulwer, on the grounds that he had directed "all his efforts and the influence of his official position" against the Spanish government to which he was accredited.² A short time later the Duke brought this charge personally to the attention of Bulwer. In the course of the conversation the Duke, according to the official report

¹Moore, PSQ, p. 17.

²Ibid., pp. 17-18. Moore quotes from British and Foreign State Papers, Vol. 38, pp. 928-1050.

of the British minister:

. . . confessed it was customary in this country to give asylum to persons pursued for political offences; that all Spanish governments have allowed this and all foreign agents have practised it, but that this custom had its limits.¹

The British minister denied the charges levied against him. A few days after their conversation the Duke ordered a search for Salamanca, his former partner in asylum, who had unfortunately arrayed himself with the opposition. M. d'Alborge was still the Danish Chargé d'Affaires, and perhaps his title was operating to his disadvantage, for it was at his house that the search was begun. Bulwer relates the violation of immunity:

The police, under M. d'Alborge's protest, enter the house of M. Alborge, Baron del Asilo, and search every corner in it; in contradiction, I believe, to the immemorial custom in Spain, which has seen no similar instance, save the celebrated one of the Duke of Ripperda, and in contradiction to the recent recognition of an usage which it might have been well to tolerate, but not to reward.²

Bulwer was subsequently given his passports, but not because of the asylum he had granted. The British Foreign Office had made some very critical remarks about the situation in Spain, and in actuality, Bulwer was made a scapegoat for Lord Palmerston, a fact of which both were well aware. The complaint, not that Bulwer had used, but that he

¹Moore, pp. 17-18.

²Ibid.

had abused the privilege of immunity, was in a large measure groundless. Lord Palmerston, in denying the charges against Bulwer, said:

It is admitted by Sir Henry Bulwer that he conformed, on the occasion of the insurrection of the 26th of March at Madrid, to the custom which has long been established in that city, and according to which the houses of foreign ministers have been always open to afford sanctuary to political offenders until they might be able to find the means of leaving the country. . . . Her Majesty's government are quite ready to acknowledge that such a practice is in itself and in principle objectionable; but while it continues to exist, a foreign minister could not without discredit to himself and to his government refuse to comply with it. . . . With regard to yourself, I need not remind you that the Earl of Clarendon, then Mr. Villiers, and British minister at Madrid, was able in 1836 to enjoy the great pleasure and the heartfelt satisfaction of affording you, when in danger, a temporary reception under the diplomatic protection of his roof. . . .¹

In the years 1865 to 1875, Spain underwent another revolutionary period which reproduced, in respect to disorder and violence, the decade of 1840 to 1850, and the practice of granting asylum was again resumed. Moore relates the case of Marshal Serrano, who had been instrumental in securing the throne for Amadeus. When that prince abdicated in 1873, Serrano was hunted through the streets by a mob. Fleeing from house to house, he finally sought refuge with the British Ambassador, Mr. Layard, who subsequently disguised him and helped him escape from the

¹Ibid., p. 19.

city.¹

It has been the practice of Great Britain on numerous occasions to grant asylum in Latin American countries also. In 1870 a fugitive named Granadas was given refuge by the British minister to Guatemala, Mr. Corbett. When the Guatemalan Minister of Foreign Affairs heard that Granadas was in the British legation, he inquired of Corbett if this were true. Moore comments:

Mr. Corbett declined to answer, holding that "according to international usages" no one had the right to ask "any explanations" as to what occurred "within the home of her Britannic Majesty's representatives." The minister of Foreign relations, while admitting "the doctrine of immunity, as . . . taught by the practice of enlightened nations," declined to accept Mr. Corbett's contention, since it might wholly defeat the action of justice and "establish the most complete immunity for abuses committed within the habitation of a foreign agent." Meanwhile, soldiers were stationed about the British minister's dwelling, with orders to arrest Granadas, if he attempted to escape. Nor were they withdrawn till, by the acceptance of conditions offered by the government, Granadas obtained permission to leave the country.²

Although the British have demonstrated an inclination to grant asylum in all countries where local usage permits the exercise of such asylum, British practice has also shown a desire to keep asylum within reasonable limits. Thus Morgenstern cites the fact that "in 1876 Lord

¹Ibid.

²Moore, Digest, II, 784-85.

Darby approved the resolution of the diplomatic corps at Port au Prince, Haiti, to the effect that protection in a legation there was to be granted only in cases where life was in imminent danger."¹

British practice has been based on the custom and usages of the country in which the asylum was granted. Great Britain has tended also to regard the violation of asylum as an unfriendly action, but not a violation of a legal right. Thus in 1865 in Haiti and 1873 in San Domingo, violations of (consular) asylum illicit the urging of moderation from the Law Officers of the Crown on the grounds that Great Britain had no legal rights despite the proven existence of a usage.²

In 1883 President Salomon of Haiti issued a circular requesting all diplomatic representatives to keep the right of asylum within the limits dictated by humanity. The Law Officers advised the Foreign Office that since the President had admitted a right of asylum to that extent, no observations were called for.³

¹Felice Morgenstern, "Extra-Territorial' Asylum," British Yearbook of International Law, XXV (1948), p. 249.

²Ibid., p. 246. Morgenstern cites Reports from the Law Officers of the Crown, 1865, pp. 59-60; ibid., 1873, pp. 68-9.

³Morgenstern, p. 249. Morgenstern cites Opinion of the Law Officers, December 15, 1883.

Similarly, in 1884 Consul General Zohrab, in charge of the Haitian legation, was advised:

In the event of disturbances taking place you should be very cautious with regard to giving asylum to natives of the country. Such asylum should be extended only to persons in imminent peril of their lives, and where it is called for by the common dictates of humanity.¹

The Law Officers of the Crown reaffirmed this stand in 1896 when they stated that a right to grant asylum could not properly be claimed by an ambassador, nor was it necessary for the discharge of an ambassador's duty. Although dealing with a case of consular asylum, the definite statement by the Law Officers on the question of diplomatic asylum in general is worth quoting:

The proposition that as Consul the German Consul can grant an asylum to alleged criminals, whether political or ordinary, cannot, in our opinion, be sustained. It is true that such a privilege has been exercised by Diplomatic Representatives in Spain and in South America, and by Consuls in Persia, but there is, in our opinion, no doubt that this right of asylum, even in the case of Ambassadors, can be properly conferred only by the consent of the countries to whom they are accredited. It is in no way necessary for the discharge of an Ambassador's duty that his house should be an asylum for persons charged with crime of any description.²

¹Morgenstern, p. 249. Morgenstern quotes from Foreign Office, 35/118.

²Ibid., p. 243. Morgenstern quotes from Reports from the Law Officers of the Crown, 1896, pp. 8-11, on the subject of the exercise of asylum by the German Consulate in Zanzibar, a British protectorate.

British practice would thus appear to permit the exercise of asylum in those countries where a local usage exists. In such countries it has been left, in a large measure, to the discretion of the British Envoy whether he will grant asylum to everyone fleeing from a governmental authority, or whether he will surrender such refugees on the request of the local authorities.¹ Each case requires a decision as to the existence of "imminent danger."²

The outbreak of the Spanish Civil War in 1936 resulted in the embassies in Madrid giving extensive shelter to Spanish Loyalists fleeing from the Franco forces. The American Chargé d'Affaires in Madrid reported to the Department of State that some of his diplomatic colleagues were interpreting asylum in the broadest possible sense. It was their opinion, he said, that "diplomatic missions could give asylum to anyone not a fugitive from justice without advising [the] Spanish Government."³

¹Great Britain's attitude in regard to the violation of a legation by a state where local usage exists was discussed above, p. 67.

²See above, p. 68.

³Green Haywood Hackworth, Digest of International Law, II (Washington: Government Printing Office, 1941), 631. Hackworth cites tel. X-30, Chargé Wendelin to Secretary of State Hull, Aug. 4, 1936, MS. Dept. of State file 852.00/2396.

The extensive use to which asylum was put eventually caused friction between the Spanish Government and the Diplomatic Missions. In a note to the Dean of the Diplomatic Corps, the Spanish Minister of State said that Spain had respected the right of asylum "through a spirit of tolerance and not because it is obligated to do so." Because the practice was being so abused, the note went on, Spain was forced to terminate its attitude of toleration.¹

While the other countries were involved in a continual controversy with the Spanish Government over the right and the practice of granting asylum, Great Britain and the United States were able at this time to avoid such contention. Excluding Spanish political refugees from shelter, they adopted and maintained the practice of granting asylum only to non-Spanish persons.²

Latin American Practice and Codification Attempts

It has been the lot of the Central and South American states to inherit the political instability of Spain. Such unsettled conditions have led to a considerable use

¹Ibid. Hackworth cites tel. X-211, Wendelin to Hull, Oct. 13, 1936, file 852.00/3447.

²Norman J. Padelford, International Law and Diplomacy in the Spanish Civil Strife (New York: The Macmillan Company, 1939), p. 157.

of legation asylum. Countless examples exist where the granting of asylum to political enemies was not only tolerated, but often encouraged. Government members in power had to consider that next week they might be the ones seeking a refuge. It has been clearly established in South America, however, that the right of asylum would apply only to political refugees and not to those accused of criminal offenses.¹ Several instances in which it has been used are mentioned by Carlos Saavedra Lamas. He notes:

Germany exercised the right of asylum in Guatemala in 1830. . . . Spain also gave refuge in Chile in 1891, and in Argentina in 1935. France did so in 1858, and Argentina gave asylum in Chile in 1891 and 1933. In 1865 the French minister to Peru refused to give over refugees, and such conduct was approved by his government in a note which said: "The right of asylum is too well established in the feeling of humanity for France to give it up. In this case it is only necessary to help in leaving the country those persons (politicians) who could not remain without danger to their person or to the country itself."²

So widespread and often has recourse to asylum

¹Georg Schwarzenberger, International Law, Vol. I: As Applied by International Courts and Tribunals (3d ed.; London: Stevens and Sons Limited, 1957), p. 259. Also see A. H. Peller and Manley O. Hudson, Diplomatic and Consular Laws and Regulations, 2 vols. (Carnegie Endowment for International Peace; Concord: Rumford Press, 1933).

²Argentine Republic, "Note of the Argentine Ministry to the Foreign Diplomatic Representatives," Ministry of Foreign Affairs and Worship, Project of Convention on the Right of Asylum (Buenos Aires: Talleres Graficos, 1937), p. 9. Hereafter referred to as Project of Convention.

occurred during the last hundred years, that many attempts have been made by the Latin American countries to regularize and give official sanction to the practice. As a result of the large number of politicians who sought asylum during the Lima revolution in 1865, the French envoy to Peru attempted to have the local diplomatic corps formulate a special Latin American international law of legation refuge. The effort was unsuccessful, but when Peru attempted two years later to end the exercise of asylum in her territory, the other ministers of Latin-American countries would not agree to its complete elimination and no definite action was ever taken.¹ In 1889 a convention regarding international criminal law was concluded between the Argentine Republic, Paraguay, Bolivia, Uruguay, and Peru, Article 17 of which provided that asylum in a legation should be respected in the case of persons prosecuted for political offenses, with the obligation of the head of the legation to immediately inform the government of the State to which he was accredited with the fact. The government could demand immediate departure of the fugitive from the national territory while the legation head on his part could demand guarantees for the safety of the man until he was out of the

¹Moore, Digest, II, 836-42; see also Stuart, p. 246.

country.¹

In 1928, at the Sixth Pan-American Conference held in Havana, a convention was signed between the American republics represented, which attempted to fix the rules to be observed in their mutual relations for the granting of asylum. The significant parts are as follows:

ART. 1.--It is not permissible for states to grant asylum in legations, warships, military camps or military aircraft, to persons accused or condemned for common crimes, or to deserters from the army or navy.

Persons accused of or condemned of common crimes taking refuge in any of the places mentioned in the preceding paragraph shall be surrendered upon the request of the local government.

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ART. 2.--Asylum granted to political offenders in legations, warships, military camps or military aircraft, shall be respected to the extent in which allowed, as a right or through humanitarian toleration, by the usages, the conventions, or the laws of the country in which granted, and in accordance with the following provisions:

- (1) Asylum may not be granted except in urgent cases and for the period of time strictly indispensable for the person who has sought asylum to insure in some other way his safety.
- (2) Immediately upon granting asylum, the diplomatic agent, commander of a military warship, camp or aircraft, shall report the fact to the minister of foreign relations of the state of the person who has secured asylum, or to the local administration authority if the act occurred outside the capital;
- (3) The government of the state may require that

¹Morgenstern, p. 258; see also Padelford, p. 164.

the refugee be sent out of the national territory within the shortest time possible; and the diplomatic agent of the country who has granted asylum may in turn require the guarantees necessary for the departure of the refugee, with due regard to the inviolability of his person, from the country;

- (4) Refugees shall not be landed in any point of the nation's territory nor in any place too near thereto;
- (5) While enjoying asylum, refugees shall not be allowed to perform acts contrary to the public peace;
- (6) States are under no obligation to defray expenses incurred by one granting asylum.¹

Asylum was also the subject of another convention adopted at Montevideo in 1933. At this time Article 1 was amended to read:

It shall not be lawful for the States to grant asylum in legations, warships, military camps and airships to those accused of common offences who may have been duly prosecuted, ■ who may have been sentenced by ordinary courts of justice, nor to deserters of land or sea forces.²

It is worthy of note that "permissible" in Article 1 of the 1928 Convention was changed to "lawful" in 1933. The 1933 Convention also stipulated that persons accused of undefined "common offences" were to be refused asylum, but

¹Excerpts from Harvard Research in International Law: Diplomatic Privileges and Immunities (Cambridge: Harvard Law School, 1932), pp. 62-63.

²Text in Manley O. Hudson, International Legislation, 1919-1945 (New York: Carnegie Endowment, 1931-1950), VI, 607. Hereafter referred to as International Legislation.

Article 2 permitted the States granting legation asylum to judge "political delinquency" whatever that might mean or involve.¹ Padelford remarks that Article 3 of the same convention was so couched that its meaning was "hopelessly beclouded";²

Political asylum, as an institution of humanitarian character, is not subject to reciprocity. Any man may resort to its protection whatever his nationality, without prejudice to the obligations accepted by the state to which he belongs; however, the states that do not recognize political asylum, except with limitations and peculiarities, can exercise it in foreign countries only in the manner and within the limits recognized by said countries.³

Despite the three conventions on the right of legation asylum, its status in 1936 was still generally uncertain. Inspired by this uncertainty and the problems encountered by numerous states during the Spanish insurrection, the Argentine Foreign Office drew up a new draft convention and submitted it to the European and American governments in July, 1937. The Lamas draft convention attempted to reform and revise the previous conventions in order to find a formula more acceptable to a larger number of states. A reasonable distinction was drawn between the granting of asylum to those pursued "for political offenses

¹Padelford, p. 164.

²Ibid.

³Hudson, International Legislation, VI, 607.

or reasons," and the refusal of asylum to those "accused of common offenses" who may have been duly prosecuted or who may have been sentenced by ordinary courts of justice.¹

The Lamas convention incorporated provisions that, considering the history of political activity in Spain, Latin America and eastern Europe, were both rational and desirable.² It clearly stated the grounds upon which asylum could be granted; the conditions to be fulfilled by the legate States, the refugees and the local governments. It thus set up clearly defined legal obligations which could be observed and enforced. If it had been adopted, which it was not, it would have aided in reducing a good many of those features which have made legation asylum so obnoxious to many states.

Colombian-Peruvian Asylum Case

Undoubtedly the most interesting recent case involving diplomatic asylum in Latin America is that of Victor Raul Haya de la Torre; contested by Peru and Colombia for five years, between 1948 and 1954, the case is significant enough to warrant a full explanation of all the

¹Argentine Republic, Project of Convention, arts. 10, 3, pp. 5, 4.

²Padelford, p. 166.

details.

In October of 1948, following the overthrow of the Bustamonte Government in Peru by a conservatively inclined military junta, all the leaders of the leftist Alianza Popular Revolucionaria Americana (the "Aprista" party) were sought by the new government. The foremost leader, Haya de la Torre, asked for and received refuge in the Colombian Embassy.¹ When his surrender was demanded, Colombia refused, and attempted to obtain a safe-conduct for him. After several notes were exchanged,² the two nations agreed on August 31, 1949, to take the case to the International Court of Justice in what is known as the first Colombian-Peruvian Asylum Case.³

In defense of the asylum, the Colombian brief

¹Manley O. Hudson, "The Twenty-Ninth Year of the World Court: Colombian-Peruvian Asylum Case," American Journal of International Law, XLV (January, 1951), 21. Hereafter referred to as AJIL. See also Norman Bailey, "Asylum and Haya de la Torre," Journal of International Affairs, IX, no. 1 (1955), p. 84.

²Hudson, AJIL, XLV, 21. See also Peru, Ministerio de Relaciones Exteriores, Notes Exchanged between the Minister of Foreign Affairs of Peru and the Ambassador of Colombia Referring to the Asylum of Victor Raúl Haya de la Torre (Lima, 1949).

³Hudson, AJIL, XLV, 21; see also Svarlien, pp. 250-52; see also Schwartzberger, International Law, pp. 260-270; see also Hersch Lauterpacht, The Development of International Law by the International Court (London: Stevens and Sons Limited, 1958), pp. 142-43 for a discussion of the conflict of legal rights and appearance of judicial indecision.

contended that the legate nation could decide whether or not the offense of the refugee was political. The Court was to decide:

. . . within the limits of the obligations resulting in particular from the Bolivarian Agreement on Extradition of July 18th, 1911, and the Convention on Asylum of February 20th, 1928, both in force between Colombia and Peru, and in general from American international law.¹

The Court was also to decide whether Peru was bound by Colombia's definitive qualification of the offense "to give the guarantees necessary for the departure of the refugee from the country, with due regard to the inviolability of his person."²

The Court ruled that the Bolivarian Agreement of 1911 (in which the two nations recognized asylum according to the general principles of international law) was invalid because there were no general principles concerning "unilateral and definitive qualification by the State granting asylum" in international law. The Court also found that the Havana Convention of 1928 did not grant the right of unilateral qualification of the crime. Although the 1933 Montevideo Convention, on the other hand, did grant such a right, Peru had not ratified that Convention. Consequently,

¹International Court of Justice, Pleadings, Oral Arguments, Documents: Asylum Case (Colombia/Peru) (Leyden: A. W. Sijthoff's Publishing Co., 1950), I, 11. Hereafter referred to as ICJ Pleadings.

²Ibid.

the Court ruled, by a vote of fourteen to two, that Colombia could not decide unilaterally whether or not the refugee was accused of a political crime.¹

On the second point the Court decided fifteen to one that Peru did not have to grant a safe conduct since Peru had not asked for the departure of Haya de la Torre.²

The Peruvian government submitted a brief claiming that Haya de la Torre was a common criminal and therefore not entitled to asylum, and also that the case could no longer be considered one of urgency under the Havana Convention. On the Peruvian counter claims, the Court decided by a vote of fifteen to one that Haya de la Torre had been accused of political crimes, and thereby rejected the first Peruvian contention.³ On the other hand, by a vote of ten to six, it ruled that since the Government of Colonel Odría had been securely in power for two years, Peru was right in claiming that the case was no longer urgent. These

¹International Court of Justice, Reports of Judgments, Advisory Opinions and Orders: Asylum Case (Colombia/Peru) (Leyden: A. W. Sijthoff's Publishing Co., (1950), p. 266. Hereafter referred to as ICJ Reports. See also William W. Bishop, "Judicial Decisions," AJIL, XLV (1951), 182-83.

²Hudson, AJIL, XLV, 22; see also Alona E. Evans, "The Colombian-Peruvian Asylum Case: Termination of the Judicial Phase," AJIL, XLV (1951), 755-62 on the judicial phase of this dispute; see also Herbert W. Briggs, "Colombian-Peruvian Asylum Case and Proof of Customary International Law," AJIL, XLV (1951), 728-31.

³Hudson, AJIL, XLV, 24.

decisions were handed down on November 20, 1950.¹ On the same day Colombia filed a request for an interpretation, asking whether, in pursuance of the Court's decisions, their embassy should give up Haya de la Torre.² The Court decided twelve to one that since the question brought up an entirely new issue, the request for interpretation could not be entertained.³

The second Peruvian-Colombian Asylum Case began on December 13, 1950, with the submission of further briefs by both countries. This time the single issue was whether or not, under the first decisions of the Court, Colombia should surrender Haya de la Torre to Peru. After studying the provisions of the Havana Convention, the Court decided that since the asylum was in violation of Article II, part 2, of the Convention (the urgency clause), the asylum should cease. But since the Convention did not stipulate how asylums should be terminated, Colombia was not bound to surrender the refugee. This decision, adopted unanimously, was handed down on June 13, 1951.⁴ Even though Colombia

¹Ibid.

²ICJ Pleadings, I, 466-68; see also Hudson, AJIL, XLV, 25.

³Hudson, AJIL, XLV, 25.

⁴Manley O. Hudson, "The Thirtieth Year of the World Court: The Haya de la Torre Case," AJIL, XLVI (1952), 11.

and Peru had agreed to accept a decision of the Court ex aequo et bono, the Court apparently felt that it could not make an inherently political decision, such as how asylum should be terminated. Negotiations were consequently begun between the two nations on the basis of the Court's rather ambiguous rulings, and, in May of 1954, Haya de la Torre was given safe conduct by the Peruvian Government in a purely political agreement with Colombia. Thus ended five years of voluntary imprisonment in the Colombian Embassy in Lima.¹

One of the main points of significance to come out of the asylum case was that a decision to grant diplomatic asylum involved a derogation of state sovereignty, and as such, must have some legal basis. The Court did not find the precedents of previous asylum cases of sufficient weight or uniformity to prove the existence of a custom that would establish any legal obligation; neither could it find a basis for legal obligation in the Conventions that were cited. The Court therefore came to the conclusion that "considerations of convenience or simple political expediency" were the reasons that States had recognized the practice of legation asylum, and not that they had felt bound to by any legal obligation.

¹Svarlien, p. 252.

Thomas and Thomas point out that the majority of the Latin American nations have time and again granted and permitted to be granted asylum in legations; this, despite their "intense jealousy of state independence and sovereign rights."¹ The conventions that had come into force had been considered as merely setting down and clarifying what was already thought of as at least regional international law. The decisions of the Court have, therefore, tended to cast doubts on the whole question of diplomatic asylum in Latin America.²

The Court's decision has had, however, the effect of bringing about a new Convention on Diplomatic Asylum³ which specifically clears up those questions on the characterization of the offense and the issuance of safe conducts which the Court stumbled over. It would, therefore, appear that the right of asylum is still firmly entrenched in the Latin American countries--subject, of course, to the many limitations designating its use. The immunity of

¹Ann Van Wynen Thomas and A. J. Thomas, Jr., Non-Intervention (Dallas: Southern Methodist University Press, 1956), p. 393.

²Ibid.

³Ibid., p. 398. Drawn up at the Tenth Conference of the Organization of American States, Caracas, Venezuela, March 26, 1954, Doc. 711. See Annals of the Organization of American States, Vol. VI. "Tenth Inter-American Conference: Report of the Pan American Union on the Conference" (Special Number; Washington: Department of International Law, 1954).

the embassy has been established without a doubt, as well as the fact that only political refugees may obtain asylum.

Conclusion

The establishment of sovereign states and their consequent need to deal with each other brought into being the fiction of extraterritoriality to protect diplomatic representatives and facilitate their functions. Under this fiction and motivated by various conditions, diplomatic representatives, during the sixteenth and seventeenth centuries, assumed from their privileges a right to grant asylum from the local authorities. It is now generally understood that although international law speaks of the extraterritoriality of embassies and legations, in reality the embassies and legations are subject to the will of the territorial sovereign and are granted immunity through reciprocity and custom rather than because they are extraterritorial.

The right of legation asylum which had fallen into disuse during the latter part of the eighteenth century, was revived coincident with the right of rebellion in the nineteenth century. It emerged mainly in those countries which experienced frequent revolution and embraced, in contrast to former times, only those persons accused of political crimes. Spain and Latin America with their

peculiar propensity for revolution have been foremost in utilizing the right of legation asylum to a considerable extent. There has, however, been a slow but continual growth in political stability in the Latin American countries, although occasional rapid reversals to former conditions are not unknown. Consequently, while mindful of the continuing need for asylum, these nations have also been fully aware of the shortcomings and ill effects of the practice and have attempted to limit asylum as much as possible.

CHAPTER III

UNITED STATES PRACTICE BEFORE 1945

Introduction

The United States has taken an equivocal attitude towards the whole question of diplomatic asylum. It has consistently denied that a right of legation asylum existed in international law. The various Pan-American conferences held to define and regulate diplomatic immunities and legation asylum have been mentioned earlier. The United States was a party to the 1928 Havana Convention. True to her professed policy, the United States signed the convention, but with the expressed reservation that she does not recognize the so-called right of legation asylum as part of international law.¹ More emphatically, because of the above position, she declined even to sign the 1933 Montevideo Convention on Political Asylum.²

This denial has not, however, meant that United States legations have been or are forbidden to grant asylum on occasions, as the numerous cases mentioned in the

¹Charles Cheney Hyde, International Law Chiefly as Interpreted and Applied by the United States (2d rev. ed.; Boston: Little, Brown and Company, 1945), II, 1289.

²Ibid., p. 1289 n.

Foreign Relations Reports bear out. While some of these grants of asylum have been disapproved of by the government, many have been met with the expressed consent and approval, if not at least the acquiescence, of the United States Government.

The question arises as to why there has been this inconsistency between practice and policy. On what grounds has the United States refused to sanction legation asylum as a legal right? On what occasions and under what conditions has the United States Government approved or disapproved the granting of asylum?

In the United States itself, the supremacy of the local law has been strictly maintained and diplomatic asylum has never existed. Very early in its history the United States Attorneys General established the policy that would be the general guide in regard to legation asylum in this country. Attorney General Bradford declared in 1794:

Even the house of a foreign minister cannot be made an asylum for a guilty citizen, nor (it is apprehended) a prison for an innocent one. And, though it be exempt from the ordinary jurisdiction of the country, yet, in such cases, recourse would be had to the interposition of the extraordinary powers of the State.¹

¹David R. Deener, The United States Attorneys General and International Law (The Hague: Martinus Nijhoff, 1957), pp. 271-72. Deener quotes Official Opinions of the Attorneys General of the United States, Vol. 1, no. 47 (1794), hereafter referred to as OAG.

Writing some years later in a similar vein, Attorney General Black argued in Hulseman's Case in 1857 that if a minister could take in anyone that he pleased, his house could become the "place of refuge for any discontented wife, rebellious child, or fugitive slave," perhaps even for criminals and deserters from the army and navy. "If this were the law of nations," Black declared, "there is no government in the world that would not be compelled, in self defence, to refuse all other governments permission to be represented by ministers residing within its territory."¹

As the previous chapter pointed out, conditions in various parts of the world, particularly the Latin American countries following their independence, fostered the revival and use of the right of legation asylum. The United States became an active participant in the practice of affording asylum in legations and consulates. Just prior to 1851, at which time the earliest significant case of asylum occurred in Chile, only a few scattered instances of the exercise of the right of asylum can be found in Central and South America.² Gilbert notes the general purport of the

¹Ibid. Deener quotes 9 OAG 7 (1857).

²This late date can be attributed to two factors. First, the Latin American Republics did not generally achieve their independence until 1825. Second, as is pointed out in Thomas A. Bailey, A Diplomatic History of

instructions of early Secretaries of State Livingston, Calhoun, Buchanan, and Clayton to various ministers in regard to asylum during this initial period:

Privileges are more liberally construed in the Mohammedan states and in South America than in the leading European states, but they should be in all cases guarded. Mr. Calhoun once states that they must be indulgently construed.¹

While the United States has disavowed the right of legation asylum both in legal theory and practice, it has qualified its denunciation by claiming the right under certain conditions. And because the United States has practiced a right of asylum, it has necessarily attempted to justify the practice. The grounds upon which States have sought justification for the exercise of the right of asylum have been referred to earlier, but a slight review is perhaps in order at this point to clarify the American position. Disregarding, for the moment, all questions of humanity and national expediency, two grounds remain from a "legal" standpoint: (1) exterritoriality and (2) acquiescence and usage. The position of the United States in regard to the concept of exterritoriality has been

the American People (6th ed.; New York: Appleton-Century-Crofts, Inc., 1958), p. 191, the period 1825 to 1840 was one in which the "energy of the American people was being absorbed by breath-taking internal expansion. . . ."

¹Harry Gilbert, "Practice of Asylum in Legations and Consulates," AJIL, III (1909), 563-64.

significantly consistent. In only a very few of the cases in which the United States has claimed the right of asylum has the presence of the fiction of extritoriality been involved. The rights that were claimed on a "legal" basis in asylum incidents were dependent, therefore, on the acquiescence of the governments and the custom and usage of the particular state. It is readily apparent that such a "legal" basis was weak, indeed.

Apart from the legal aspects upon which attempts have been made to support the exercise of the right of asylum, two main factors have motivated a claim of the privilege. The first was the very old human desire to offer sanctuary to fugitives in danger of mob violence or the arbitrary justice of a newly formed revolutionary government. But perhaps just as important, for reasons of national pride, has been the desire to maintain the same rights and privileges that have been claimed by other legations. Asylum, when it has been granted by the United States, has not, however, welcomed one and all. On the contrary, ministers and consuls have been subject to a number of stringent restrictions as to the type of offender who might secure refuge, the duration of asylum, and the place in which asylum could be legally maintained.

Moore, writing in 1906, cited paragraph 51 of the Standing Instructions to Diplomatic Officers of the United

States in existence at that time:

In some countries, where frequent insurrections occur and consequent instability of government exists, the practice of extraterritorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents and is practically recognized by the local government, to the extent even of respecting the premises of a consulate in which such fugitives may take refuge. This Government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its representatives to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct them that it will not countenance them in any attempt knowingly to harbor offenders against the laws from the pursuit of the legitimate agents of justice.¹

It can be seen from the above instructions that while the practice of asylum is unsanctioned by the Government, the minister has not been forbidden to offer asylum under certain conditions. Reliance upon the discretion of the minister has, however, on several occasions, resulted in complications. The first part of the nineteenth century had witnessed the wholesale decline of the exercise of asylum; with its reappearance in Spain and Latin America toward the middle of that century, it had taken on a new look. The right of asylum was limited to political offenders while criminals were excluded from its use. The difficulty in determining just who were "criminals" and, therefore,

¹John Bassett Moore, A Digest of International Law (Washington: Government Printing Office, 1906), I., 779.

had to be surrendered on demand has given rise to some contention in several important cases.

A chronological examination of instances of asylum in which United States legations have been involved and the subsequent views of the government in regard to these incidents will most effectively demonstrate the problem the United States has been faced with: the difficulty of resolving a problem that involves a conflict between state sovereignty as opposed to considerations of humanity which rest upon unsatisfactory legal grounds. The asylum incidents will be divided into three groups for examination: (1) those cases involving consulates; (2) those cases in which asylum has been refused or instructions requested with no case pending;¹ and (3) cases of asylum granted.

Cases of Consular Asylum

The main difference that exists between the consulates and legations is that recognized immunities are attached to the legation, while the same is not true of consulates. Although the government does not sanction a right of asylum in legations, it does not recognize any right of asylum for consulates. Morgenthau points out: "The

¹Gilbert, p. 593, says that the real policy of a government is learned from instructions for "future guidance, since then the doctrine may be found untrammelled by any of the complications of an actual difficulty."

difference is only that in the one case it is certain that as a rule there is no right of asylum and that refugees may be recaptured by force, and in the other case there is not such certainty."¹ The position of the United States does not, however, abrogate recognition by the United States of the existence of asylum in consulates in those countries in which usage has grown up and been acquiesced in by the local government. Excluding the capitulation countries, the practice of consular asylum has developed in only a very few countries, of which Haiti and Santo Domingo are the chief examples.²

In a case occurring in Peru in 1853, Consul Oakford harbored defeated rebels who fired on the soldiers pursuing them from the consulate. The demand of the authorities to surrender the fugitives being denied, the consul was insulted and the fugitives taken by force. As a result, the American minister to Peru demanded a public apology from the authorities and assurance that there would be no further violations in the future. Mr. Marcy, replying to the despatches from Peru, was highly indignant about the part played by the American consul and minister. He declared in part:

¹Felice Morgenstern, "'Extra-Territorial' Asylum," BYIL, XXV (1948), 251.

²Ibid., pp. 251-52.

Neither the law of nations nor the stipulation of our treaty with Peru recognizes the right of consuls to afford protection to those who have rendered themselves obnoxious to the authority of the government under which they dwell.¹

Marcy then went on to say that "the rudeness and insults addressed by Governor Benavides to the consul were inexcusable and ought to be atoned for. . . ." He qualified this, however, by remarking that he could well understand how the Governor had "been betrayed into an intemperate warmth of language by the interference of Consul Oakford. . . ." He finished his instructions by declaring: "The conduct of the consul is regarded by this Department as censurable in the highest degree . . . [and] you are instructed therefore to communicate to the minister of foreign relations the disapproval of this Government of Consul Oakford's course."² In 1855, Marcy repeated almost verbatim the instructions of 1853 in a case arising in the consulate in Nicaragua.³

Acting Secretary of State Hunter made a precedent-setting opinion in regard to a consulate violation that occurred in Haiti in 1865. He wrote in that year:

¹Moore, Digest, II, 833. Moore quotes Secretary of State Marcy's instructions to Mr. Clay, minister to Peru, Jan. 24, 1854, MS. Inst. Peru, XV, 126.

²Moore, Digest, II, 834-35.

³Gilbert, p. 564.

Consuls may harbor political refugees, but as the law of nations confers upon them no right to do this, and as the treaty between the United States and Hayti [sic] is silent upon the subject, no sufficient cause of complaint would arise if refugees so harbored were to be taken by the local authorities from the consular abode.¹

In 1873, Secretary of State Fish regarded the violation of the consulate in St. Marc, Haiti, as an international discourtesy requiring an emphatic protest and redress, but did not make any claim on account of the fugitives arrested.² Similarly, a consulate violation in Mexico in 1877 was considered an act of bad faith, considering previous Mexican assurances of its respect of the protection, but no action was to be taken.³

Secretary of State Gresham in 1894, writing to the United States Minister to Turkey, distinguished between legation and consular asylum in denying a right of asylum to the latter. He declared:

This government does not sanction the so-called right of asylum, even as to the admittedly extra-territorial precincts of an envoy's dwelling, and it does not recognize it in respect to a consulate.⁴

¹Moore, Digest, II, 807. Moore quotes Hunter's instructions to Mr. Peck, Oct. 4, 1865, Am. Inst. Hayti, I, 62.

²For. Rel., 1873, I, 459-60. Fish to Bassett, minister to Hayti, Mar. 26, 1873.

³Moore, Digest, II, 824.

⁴For. Rel., 1894, p. 735. Gresham to Terrell, July 11, 1894.

In Santo Domingo in 1904, following the consular agent's refusal to surrender the ex-governor, the premises were invaded by a force of armed men and the governor removed over the protest of the agent. Secretary of State Hay, in an instruction to the Chargé d'Affaires at Santo Domingo City, ordered a protest and stated:

While the vice-commercial-agent was perhaps overzealous he was probably justified, under the peculiar custom which prevails in the Dominican Republic, in extending shelter to the refugee.¹

Several months later in the same year, however, the American consul in Paraguay requested instructions about whether asylum should be granted by the consulate during the revolution that had just broken out. The reply by Mr. Adee was most emphatic: "Consulate should not be used as an asylum for political refugees."²

Despite Adee's emphatic statement, there was a more liberal policy that came to prevail: a distinction was permitted for humanitarian purposes between asylum in the strictest sense and a temporary refuge for the preservation of innocent life. Thus Morgenstern notes that "between 1910 and 1913 there are five instances of instructions to consuls based on that distinction and allowing

¹For. Rel., 1904, p. 288. Hay to Powell, Feb. 17, 1904.

²Ibid., 1904, p. 860. Adee to Ruffin, Aug. 15, 1904.

consular officers discretion in determining the course to be taken 'upon broad considerations of humanity.'¹ Such has continued to be the position maintained by the United States. The Foreign Service Regulations of 1939, addressed to diplomatic and consular officers alike, rely uncompromisingly on humanitarian considerations in regard to asylum:

Involuntary refuge. The extension of refuge to persons outside the official or personal staff of a diplomatic or consular officer can only be justified on humanitarian grounds. Diplomatic and consular officers may afford refuge to uninvited fugitives whose lives are in imminent danger from mob-violence, but only during the period active danger continues. Refuge must be refused to persons fleeing from the pursuit of the legitimate agents of the local government.²

It is generally accepted that consulates have even a lesser right to grant asylum than legations because foreign consular officials do not share under international law the same immunities as accredited diplomatic representatives. They are, however, as recognized agents bearing commissions from their governments, entitled to special respect and consideration from local authorities.³

¹Morgenstern, p. 253. Morgenstern cites For. Rel., 1912, p. 399.

²Green Haywood Hackworth, Digest of International Law, II (Washington: Government Printing Office, 1941), 623. Hackworth cites Foreign Service Regulations of the United States (July, 1939), sec. III-4, note 1.

³Hackworth, Digest, II, 621.

The practice of the United States has produced a theory which may be a basis upon which asylum in consulates can be granted. By strictly defining the conditions under which a consular officer may act, the element of faulty judgment in the exercise of discretion has, to a large extent, been eliminated.

Cases of Asylum Denied or
Instructions Requested

United States ministers stationed in countries wherein frequent recourse has been made to legation asylum have, on numerous occasions, asked the State Department how they should proceed. Their reasons for denying asylum, their requests for instructions, and the replies from the State Department illustrate the problems involved and the ill effects that have resulted from granting asylum.

In 1865, the new American minister to Peru, Hovey, refused to grant asylum to members of the recently overthrown government despite the fact that his predecessor had given refuge in the American legation to one General Canseco earlier in the same year. This General Canseco, following his escape from the country, had been instrumental in overthrowing the government. In support of his stand, Hovey stated:

It seems to me that this practice is highly censurable and leads to very evil consequences. . . .

[T]he houses of foreign ministers have become little less than the abode of criminals who flee from the vengeance of the law. . . . I have refused to recognize the doctrine of asylum as practiced in this country, until I am otherwise directed by the Department of State.¹

His position was at this time implicitly sanctioned by the State Department. Two years later, following a conference of the diplomatic corps in Lima, in which Hovey attempted to limit the practice of the right of asylum, Secretary of State Seward said in response:

I observe that . . . you have taken these positions, viz.: That Peru is entitled to all the rights and privileges of a Christian nation, and as such should be placed precisely in the position of the United States, France, England and other Christian countries, and that the doctrine of asylum cannot be properly claimed or enforced in Peru, unless it be in exceptional cases recognized by the universal law of nations; that as soon as a legal charge of crime is made, whether political or not, you hold it to be the duty of the minister in whose legation an offending party has taken refuge to leave him without interference to the authorities demanding his arrest. Again, that you claim no diplomatic power or right in Peru that your Government does not accord to the representative of Peru at Washington.

These positions are altogether approved.²

Although the other nations would not accede to Hovey's attempted abolition of the right of asylum, no further instances are recorded in which the United States

¹Moore, Digest, II, 836-37. Moore cites For. Rel., 1866, part 2, p. 624.

²For. Rel., 1867, II, 764. Seward to Hovey, Feb. 25, 1867.

utilized the right in Peru.¹

The next year, 1868, conditions in Haiti caused such extensive use to be made of legation asylum that Minister Hollister requested instructions from the State Department, emphasizing that:

It does more mischief here than it does good, and is really, as it is practised, little more than offering a premium for factious disturbances and a bid for sedition. The three Chargés here are ready to recommend the discontinuance of this much abused custom if our Government is ready to take the step.²

Secretary Seward's reply was somewhat more lenient in regard to Haiti than it had been in regard to Peru. He said:

The right of a foreign legation to afford an asylum to political refugees is not recognized by the law of nations as applicable to civilized or constitutionally organized states. It is a practice, however, which, from the necessity of the case, is exercised to a greater or less extent by every civilized state in regard to barbarous or semi-barbarous countries. The revolutionary condition seemed to become chronic in many of the South American nations after they had achieved their independence, and the United States, as well as the European nations, recognized and maintained the right of asylum in their intercourse with those republics. We have, however, constantly employed our influence, for several years to meliorate and improve the political situation in these republics, with an earnest desire to relinquish the right of asylum there. In the year 1867 we formally relinquished and renounced that right in the Republic

¹Gilbert, p. 565.

²For. Rel., 1868, II, 355. Hollister to Seward, May 8, 1868.

of Peru. This Government has also largely modified the exercise of that right among some of the oriental nations.

Thus we are prepared to accept the opinion you have deliberately expressed that it is no longer expedient to practice the right of asylum in the Haytian Republic. Nevertheless, we should not be willing to relinquish the right abruptly, and in the midst of the anarchy which seems to be now prevailing in hayti, in the absence of matured convictions on your part. Nor do we think it expedient that it should be renounced by the United States legation any sooner or in any greater degree than it is renounced by the legations of the other important neutral powers. With these reservations, the subject is confidently left to your own discreet judgment.¹

Secretary of State Fish, however, in 1869 took a stronger approach. In response to information from Minister Bassett in Haiti that the United States legation was being used to a considerable extent as a sanctuary for political refugees, he stated:

The proceeding has never been sanctioned by the Department, which, however, appreciated those impulses of humanity which make it difficult to reject such appeals for refuge. The expediency of granting an asylum . . . is more than questionable, and the obligation to take that course has no foundation in public law, however in Hayti or elsewhere it may be tolerated and customary.

While you are not required to expel those who may have sought refuge in the legation, you will give them to understand that your Government can not on that account assume any responsibility for them, and especially can not sanction any resistance by you to their arrest by the

¹For. Rel., 1868, II, 358. Seward to Hollister, May 28, 1868.

authorities for the time being.¹

Ten years later in 1879, the question of asylum again arose and Secretary of State Evarts echoed the sentiments of Secretary Fish. He informed Minister Langston of Haiti that while sentiments of humanity kept the United States from ordering its agents to refuse temporary shelter to victims of mob violence, this Government would look with extreme disfavor on any attempts to harbor wanted criminals from local jurisdiction.²

In 1885, the American Minister to Colombia, Scruggs, expressed an opinion to the foreign minister regarding the extensive character of immunities attaching to diplomats and their residences. Secretary of State Bayard completely denied the fiction of extritoriality upon which Scruggs had based his opinion.³

In Haiti, cases arising in 1885,⁴ 1888,⁵ 1890,⁶

¹For. Rel., 1871, p. 696. Fish to Bassett, Dec. 16, 1869.

²For. Rel., 1879, p. 582. Evarts to Langston, Aug. 6, 1879.

³Moore, Digest, II, 800-802.

⁴For. Rel., 1886, pp. 530-31. Bayard to Thompson, Nov. 7, 1885.

⁵For. Rel., 1888, I, 938. Rives to Goutier, Oct. 31, 1888.

⁶For. Rel., 1890, p. 523. Blain to Douglass, Mar. 27, 1890.

and 1902,¹ brought from the United States a reiteration of its position that international law did not recognize a right of asylum, and that the United States did not claim it nor sanction its use; but where its existence was recognized through custom and usage the United States within discretion and only for motives of humanity would expect the same rights accorded to other legations.

In Ecuador in 1912, the State Department received a report from the American Chargé d'Affaires Bingham that he had been asked for asylum in the future, should conditions arise to make the need necessary. He stated that he could not commit himself to future contingencies, but would decide when and if a need arose; he advised that safety should be sought, if possible, from some other quarter, as it was United States policy to remain aloof from interference in internal matters.² The Department in reply, while approving of his action,³ at the same time referred him to its instruction to Minister Young of January 30, 1912, in which a distinction was made between temporary refuge and asylum. An application for temporary refuge to preserve

¹For. Rel., 1902, pp. 681-82. Ades to Powell, Aug. 6, 1902.

²For. Rel., 1912, 405. Bingham to Secretary of State Knox, Mar. 18, 1912.

³Ibid., p. 410. Acting Secretary of State Wilson to Bingham, May 6, 1912.

human life was to be left to the minister's discretion.¹

A similar case occurred in Mexico in 1920 in which a request was made for future asylum if it should be needed. The Department again reiterated abstinence from any actions that would appear as interference in internal affairs. Asylum was only to be offered to protect lives immediately and obviously in danger.²

The same general instructions were made in response to a query by the minister to Chile in 1925.³ And in reply to the American Ambassador to Spain in 1931, Hackworth notes that the State Department declared it did not recognize a right of asylum and that he should not permit the inference to arise that he would grant asylum to other than American citizens.⁴ Temporary refuge might be given to those persons in extreme danger, but not even Americans were to be sheltered from arrest for violations of local law.

The outbreak of the Spanish Revolution in 1936 was

¹Ibid., p. 399. Knox to Young, Minister to Ecuador, Jan. 30, 1912.

²For. Rel., 1920, III, 136, 139. Secretary Colby to Chargé d'Affaires Hanna, Apr. 14, 1920.

³Hackworth, Digest, II, 628-29. Hackworth cites Secretary Hughes' telegram to Minister Collier, Jan. 27, 1925, MS. Department of State, file 825.00/365.

⁴Hackworth, Digest, II, 629-30.

the cause of great recourse being made to the various legations in Madrid for asylum. The practice of the United States appears to have followed its previous dictates in regard to the question of legation asylum. On being informed by the American Chargé that other embassies were engaging in asylum extensively, the Department of State replied:

In view of the fact that Americans now in the Embassy and outside are more than sufficient to tax the facilities of the Embassy, there is no alternative but to discourage requests for providing refuge to other than American nationals. . . . While we are of course anxious to render every possible help to nationals and diplomatic representatives of Latin American and other countries, we could not throw open the doors of the Embassy so as to further jeopardize the safety and means of protection for our own nationals. In extreme circumstances where the immediate question of life is at stake you should of course extend such protection as the limitations of the Embassy permit.¹

In summation, as accredited representatives to one government, diplomatic agents, by harboring supposed enemies of that government, placed themselves in an invidious position. They could easily be accused of interfering in internal affairs. Thus, whenever the United States had the opportunity to judge whether asylum should be given prior to an actual grant, it advised against it. Conditions were so chaotic in some countries, however, that the United

¹For. Rel., 1936, II, 661. Secretary Hull to Wendelin, Aug. 5, 1936.

States could not place its representatives in the heartless position of refusing asylum to any and all. To take into account such exceptional conditions, the theory of temporary refuge was devised.

Cases of Asylum Granted

Despite the strong stand the United States has taken against the right of asylum, the Foreign Relations Reports of the United States cite many more instances of asylum being granted than of its being refused. An examination now of those grants will show the causes for such actions.

Following a successful revolution in the last part of 1854, the new Peruvian Government, in January of 1855, demanded all foreign embassies to send out of the country those refugees to whom asylum was being given. Moore notes:

The minister of the United States replied that . . . foreign legations were "entirely extraterritorial," and [that] the Government of Peru had no jurisdiction either over them or over foreign vessels of war lying in her ports.¹

The circular, in the American Minister's opinion, was a notification of desire. It could not, he felt, nor was it so intended, "diminish the privileges" he considered as his

¹Moore, Digest, II, 835.

under international law. The rest of the diplomatic body were also in agreement that "the right in question . . . had been officially recognized and constantly respected by all the governments in Peru since its independence."¹

The Paraguayan political scene during the years 1867 and 1868 was characterized by considerable instability. The internal disorder was further aggravated by aggression on the part of Brazil and Argentina. The American Minister, Washburn, feeling the capital might be evacuated, informed the State Department that, as against the enemy, asylum would be granted to all who sought it, with the exception of notorious criminals.² Secretary of State Seward's reply states:

Your intention to afford an asylum in the legation to those who may resort to it, save notorious criminals, as far as it can be done without compromising your neutral character or that of your country, is approved.³

When the city was subsequently evacuated, Washburn chose to remain and the United States legation was declared by him to be "for the time United States territory."⁴

¹Ibid.

²For. Rel., 1867, II, 648. Washburn to Seward, Oct. 14, 1867.

³For. Rel., 1868, II, 652. Seward to Washburn, Jan. 14, 1868.

⁴Moore, Digest, II, n.p. 826. Moore cites Washburn's History of Paraguay, II, 216-23.

Asylum was given to a number of political refugees, among whom were two Americans and an Englishman. Washburn attempted to have the Americans considered as employees of the legation, but the foreign minister refused to recognize them as embassy personnel. He stated, however, that they might remain in the embassy residence, but they were not to leave the building. One of the Americans, Manlove, disregarded the orders and was arrested and imprisoned when he went into the streets. Following futile efforts to obtain his release, Washburn referred the matter to the United States government. Moore notes that "no representations on the subject, however, appear to have been made by the Department of State."¹

Some months after the asylum had first been granted to the various refugees, the foreign minister demanded the dismissal from the legation of all individuals who were receiving asylum. He claimed that the reasons for which asylum had first been granted no longer existed. On learning of the demand, all the refugees, except the American and the Englishmen, left the embassy. When Washburn, having resigned and headed for home, attempted to leave the country accompanied by the two men, the two refugees were seized and imprisoned. Their release was subsequently

¹Moore, Digest, II, 825-26.

obtained by Admiral Davis who had been sent to Paraguay on an American warship to protect American citizens and bring the new American Minister.¹ Moore finds it remarkable:

As affecting both the practice of asylum and the expediency of giving it countenance, that, while it was the principal source of Mr. Washburn's difficulties, neither the instructions of Mr. Seward nor the subsequent correspondence complain of the refusal of the Paraguayan Government to permit its continuance, though among those who were forced to abandon the legation were several American citizens.²

In 1870 a rebel named Granadas sought and was denied asylum from the American legation in Guatemala. He was, however, able to obtain refuge from the British Minister, who refused to release him until Granadas was granted safe conduct out of the country. Three months after his release, having obtained permission to leave the country, he returned with five hundred men and started a revolution which overturned the government. During the resultant upheaval, the American Minister, Hudson, at this time extended the protection of the embassy to all parties and nationalities.³ Said Hudson:

The authorities have in no instance objected to my action, but approved my course and claimed the protection of the legation. . . . Humanity called for

¹Ibid., pp. 828-30.

²Ibid., pp. 830-31.

³Ibid., pp. 784-85.

the part I bore, and where there was so much to be justly apprehended, I believe my conduct would be excused, if not fully warranted, in acting in that behalf.¹

Acting Secretary of State Davis replied:

The efforts which you have made for the general protection of life and property, during the recent hostilities in Guatemala, meet with the approval of this Department.²

The year 1875 was an epic one in the use of legation asylum. Attempted revolutions, army mutinies, and the partial burning of the government palace in Bolivia brought numerous requests for asylum to the various legations. The American Minister, Reynolds, refused most of the requests on the grounds that the American flag could not be used as protection against the laws of the country. He did, however, afford protection for two persons who signed statements that they had not been involved in the revolutions, but had been falsely implicated by personal enemies. Following notification by the Bolivian foreign minister that one of the men had previously taken refuge in the American embassy to conspire against the lawful government, Reynolds replied, to the complete satisfaction of the foreign minister, that should he learn of such an act, asylum would be

¹For. Rel., 1871, p. 542. Hudson to Fish, July 31, 1871.

²Ibid., Davis to Hudson, Sept. 6, 1871.

terminated immediately.¹

In this same year conditions in Haiti also were extremely disturbed. Wholesale arrests by the government caused one Boisrond Canal and two companions to flee to the residence of the American Minister, Bassett, who had already given asylum to three other opposition members. The house was soon surrounded by disorderly troops whose noise made sleep impossible, and whose actions were not only disrespectful to the minister and his servants, but gave cause for alarm concerning their safety. The American minister refused, at the request of the Haitian Government, even to submit the names of the refugees, and protested the outrageous conduct of the Haitian Government troops.² In a note to the foreign minister, he stated:

The persons who may have sought refuge under my flag are considered as being on the territory and under the protection of the United States. I guarantee that they shall in no way affect the public order while they remain here.³

In his report to the United States Government, Bassett said: "The right of asylum has never been renounced by this government . . . and [it] practically . . . [has]

¹For. Rel., 1875, I, 82. Reynolds to Secretary of State Fish, Feb. 20, 1875.

²Ibid., II, 686-701. Bassett to Fish, May 8, 1875.

³Ibid., p. 694. Bassett to Foreign Minister Excel-lent, May 4, 1875.

refused to assent to its discontinuance. . . .¹

In the meantime, the Haitian representative in Washington had requested Secretary of State Fish to order Bassett to release the refugees. His notification to Bassett concerning the incident and the conversation stated:

It is regretted that you deemed yourself justified by an impulse of humanity to grant such an asylum. You have repeatedly been instructed that such a practice has no basis in public law, and, so far as this Government is concerned, is believed to be contrary to all sound policy. . . . Though it might have been preferable that you should not have received those persons, it was not deemed expedient to comply with his request.²

Moore notes, however, that the disrespectful actions on the part of the Haitian Government continued until the threat of sending a United States warship brought about an agreement whereby the refugees were banished for life and permitted to leave the island.³

Within seven months, in April of 1876, Boisrond Canal had returned to the island, successfully overturned the government and become the new president. In the following year, another revolution was instigated during the president's absence, but was put down by Canal upon his return. The year 1878 saw another uprising and again the

¹Ibid., p. 697. Bassett to Fish, May 19, 1875.

²Ibid., p. 701. Fish to Bassett, June 4, 1875.

³Moore, Digest, II, 814-15.

various embassies were turned to for refuge. The American legation gave asylum to three persons. It was the unanimous decision of the diplomatic corps at this time not to give up anyone in a legation or consulate. The government acquiesced at this firm stand and permitted all the refugees to leave the country.¹

The continual insurrections and the resultant extensive use of legation asylum caused Secretary of State Evarts in 1879 to write to the American Minister in Haiti, Langston, as follows:

If the so-called "right of asylum" (which this Government has never been tenacious in claiming for its officers abroad) is to continue to exist as a quasi rule of public law, in communities where the conspirators of to-day may be the government of to-morrow, it should at least be so exercised as to afford no ground of complaint on the score of aiding and comforting rebellion by conniving at communication between the refugees in asylum and their associates who are, it may be, engaged in hostilities against the existing government. It is evident that asylum would be as intolerable as reprehensible, were not the refugees supposed to be kept out of mischief as well as out of danger.²

The political situation in Chile in 1891 found the American Minister, Egan, deeply involved in the use of legation asylum. In August of that year, Egan gave asylum to several revolutionists attempting to overthrow the government.

¹Ibid., p. 816.

²For. Rel., 1879, p. 582. Evarts to Langston, Aug. 6, 1879.

Nine days later, the government having been overthrown, the American embassy received in asylum some eighty members of the defeated government, including the family of ex-president Balmaceda.¹ Although this number gradually reduced itself to nineteen during the ensuing month, the new regime, claiming that the remaining refugees and their friends were abusing the privilege of asylum, began to police the embassy. Not only were visitors to the embassy prevented from entering or arrested upon leaving, but two embassy servants were arrested and imprisoned.² When such actions were protested by Egan, he was fully supported by the State Department, and Acting Secretary of State Wharton informed him that:

The President desires to establish and maintain the most friendly relations with Chile, but the right of asylum having been tacitly, if not expressly, allowed to other foreign legations, and having been exercised by our minister with the old Government in the interest and for the safety of the adherents of the party now in power, the President can not but regard the application of another rule, accompanied by acts of disrespect to our legation, as the manifestation of a most unfriendly spirit.³

Egan, while protesting the disrespectful actions of the Chilean Government, refused to turn out the refugees

¹Gilbert, p. 572.

²Moore, Digest, II, 791-92.

³For. Rel., 1891, p. 177. Wharton to Egan, Oct. 1, 1891.

and made several attempts to get permission for them to leave the country. In discussing the question of safe-conducts for the refugees, both the Chilean Foreign Minister, Matta, and Egan accepted the principle of the extritoriality of the minister's residence.¹ However, as Moore notes:

While Senor Matta deduced from that notion merely the right to grant asylum, Mr. Egan pushed it further. . . . [He stated] that his house was "an integral part of the United States," and that "without the will and permission" of that Government, Chile "could not consider" as subject to her "judicial action" persons "who, from every point of view," were "beyond its jurisdiction. . . ."2

During the month of January, 1892, Egan finally succeeded in getting those refugees that remained safely aboard an American warship, the Yorktown. After the refugees were gone the police were removed from about the legation premises.³

Another unsuccessful revolution in Chile in 1893 again brought refugees to the American legation, and Egan again received them on the grounds that he was protecting their lives. This time, however, the accusation by the Chilean Government that the men were criminals was upheld

¹Moore, Digest, II, 796.

²Ibid., pp. 796-97. Moore cites For. Rel., 1891, pp. 195, 196, 229-30, 235-36.

³Moore, Digest, II, 798.

by the State Department, and Egan was ordered to surrender the refugees to the proper authorities.¹

The problems resulting from the recent grants of legation asylum inspired President Cleveland to include a mention of it in his Annual Message of 1893. He said:

The vexatious question of so-called asylum for offenders against the State and its laws was presented anew in Chile by the unauthorized action of the late United States Minister in receiving into his official residence two persons who had just failed in an attempt at revolution and against whom criminal charges were pending growing out of a former abortive disturbance. The doctrine of asylum as applied to this case is not sanctioned by the best precedents and, when allowed, tends to encourage sedition and strife. Under no circumstances can the representatives of this government be permitted, under the ill-defined fiction of extraterritoriality, to interrupt the administration of criminal justice in the countries to which they are accredited. A temperate demand having been made by the Chilean Government for the correction of this conduct in the instance mentioned, the minister was instructed no longer to harbor the offenders.²

Ecuador was the scene of a successful revolution in 1895. But because no government existed for a time immediately following the insurrection, the American Minister, Tillman, permitted members of the deposed regime and their families to gain asylum in the embassy. Although he had previously, during the revolution, refused all applications

¹Ibid., pp. 799-800.

²For. Rel., 1893, p. iv. Annual Message to Congress by Grover Cleveland, Dec. 4, 1893.

for asylum, the circumstances after the fall of the government inclined him to the view that such shelter was not in the nature of asylum.¹ The opinion of Secretary of State Olney supported him in this view. Considering that there appeared to be no national or municipal government in the capital, he wrote:

Shelter under such circumstances was a mere act of humanity, unaccompanied by any assumption of extra-territorial prerogatives by you, or interference with any rights of legitimate government or sovereignty. This is quite distinct from the so-called right of asylum, which can logically only be exercised in disparagement of the rights of the sovereign power by withdrawing an accused subject from its rightful authority. The practice of this kind of asylum is not a right derived from positive law or custom; it is not sanctioned by international law, and can only find excuse when tacitly invited and consented to by the State within whose jurisdiction it may be practiced.²

When Smythe, the American Minister to Haiti, reported in 1896 that he had given asylum to a political suspect and asked the "usual courtesy" of safe-conduct out of the country, Secretary of State Olney was most emphatic in condemning the action.³ His reply stated:

This Government's uniform and emphatic discouragement of the practice of political asylum has been made known to your legation by repeated instructions.

¹For. Rel., 1895, I, 244. Tillman to Olney, Sept. 1, 1895.

²Ibid., p. 245. Olney to Tillman, Sept. 25, 1895.

³Gilbert, p. 574.

No right to protect such persons, by harboring them or withdrawing them from the territorial jurisdiction of their sovereign, is or can be claimed on behalf of the diplomatic agencies of this Government. . . . Your request for the "usual courtesy" to permit you to place him on board some outgoing vessel is not understood. . . . If the Haytian Government should exercise its evident right to refuse you such permission, you would be placed in a wholly indefensible position. The "usual courtesy" of which you speak appears to be only another name for the practice of that form of alien protection . . . which this Government condemns. Whatever the result of your request, you should at once notify [the refugee] that you can no longer extend to him your personal hospitality.¹

Three years later the State Department reiterated this same general instruction. With the absence of the president from the capital of Ecuador in 1899, a revolution had assumed threatening proportions. The American Minister, Sampson, reported to his Government that because conditions were so uncertain, the foreign minister of Ecuador had requested asylum for the members of the government in case the government might be overturned. Sampson, taking into consideration existing instructions, gave his assent on the grounds that he would be affording asylum to the legitimate government members.²

Moore notes the State Department conceded that "the

¹For. Rel., 1896, p. 381. Olney to Smythe, Feb. 18, 1896.

²For. Rel., 1899, pp. 256, 257. Sampson to Secretary of State Hay, Jan. 16, 1899, and Apr. 10, 1899.

case of a member of an overturned titular government" might be "different" from that of a revolutionist, "until the empire of law is restored, and the successful revolution establishes itself in turn as the rightful government, competent to administer law and justice in orderly process.

. . ."¹ Nevertheless, the State Department's instructions to Sampson were:

A general rule, in the abstract, can not be laid down for the inflexible guidance of the diplomatic representatives of this Government in according shelter to those requesting it. But certain limitations to such grant are recognized. It should not, in any case, take the form of a direct or indirect intervention in the internecine conflicts of a foreign country, with a view to the assistance of any of the contending factions, whether acting as insurgents or as representing the titular government.

I therefore regret that I am unable to approve the promise of shelter made by you to the members of the titular government before the emergency had actually arisen . . . and especially am I unable to approve the apparent ground or motive of the promise, that you would have saved from death the legitimate heads of the Government "until such a time as they would again assume the functions of their respective offices."²

Secretary Hay then continued his explanation, perhaps more to the point, that unless the interests of the United States or its citizens were involved, the Government

¹Moore, Digest, II, 806. Moore quotes For. Rel., 1899, p. 256.

²For. Rel., 1899, p. 258. Hay to Sampson, June 5, 1899.

would remain "a passive spectator of such conflicts. . . ." His estimate of the possible ramifications of assuring shelter for future times was not only cogent, but a primary example of the abusive use the right of asylum could be put to. Hay thought that "it might lead to great abuses . . . if assurances were given in advance to the leaders of either of the contending factions that they might carry the conflict to whatever extremes, with the knowledge that at last they should enjoy immunity in the protection of this Government. . . ." ¹

In the same year the American Minister to Haiti, Powell, reported to the United States Government an incident in which a man fleeing from arrest was pursued and captured in the American legation. On his demand the refugee was returned and apologies were made. The Department of State approved the Minister's action that the refugee "should be sheltered against all but strictly regular legal process," and that "your remonstrance against violation and demand for refugee's return were rightly made." ² Powell subsequently gave asylum to two more political refugees. This was followed by a Haitian Government decree that all refugees under legation asylum should leave the

¹Ibid., pp. 258-59.

²Ibid., p. 390. Hay to Powell, Sept. 2, 1899.

country on the next boat.¹ The State Department's reply on learning of this development was:

The Haitian Government has a right to expel its own citizens and you cannot shield them from the order simply because they happen to be your guests. You may shelter those under immediate apprehension of lawless violence, but cannot harbor an accused offender against Haitian law.²

When Powell in answering stated he had not given asylum to anyone charged with a crime; that the men in question had been merely accused of promoting discontent to the detriment of peace and order, Secretary of State Hay replied:

The men in question appear from your statements to have been political suspects in this sense, [a peril to public order] and as such to have taken refuge in your dwelling to escape pursuit. On several occasions in the past your predecessors have exceeded their legitimate rights and functions in demanding and obtaining for this class of persons, natives of the country, permission to quit the territory unmolested--a practice which the Department has uniformly condemned.³

Powell's difficulties with the question of the right of asylum were far from being over. When in 1899 he refused asylum to a Dominican whom he considered guilty of conspiring against the Haitian Government, Secretary Hay questioned "your capacity [as a minister] to judge of the

¹Ibid., pp. 384-85. Powell to Hay, Aug. 14 and Aug. 16, 1899.

²Ibid., p. 386. Adee to Powell, Aug. 17, 1899.

³Ibid., p. 390. Hay to Powell, Sept. 2, 1899.

guilt or innocence [sic] of persons applying to you for shelter." After this reproof, Hay then approved the minister's refusal "because it is not shown there existed such circumstances of danger from lawless violence as makes it sometimes permissible to afford shelter."¹

In 1905 Powell again found himself at odds with the Department when he informed them that he had given refuge to two officials of the government in fear of their lives. Acting Secretary of State Pierce condemned the action as meddling in affairs of a political nature without any such justification as imminent peril from lawless or mob violence. Powell was told that "it is expected that . . . [the] instructions . . . [of the Department] will be carefully considered and observed in the future."²

Haiti, in 1911, was again the scene of political dissension. The President of Haiti requested permission of the American Minister, Furniss, to seek refuge aboard a United States Naval vessel until a merchant vessel should arrive. When Furniss notified the Department of State of the request, he was told that he could give temporary refuge to the President in the legation "if necessary to

¹Ibid., pp. 254-55. Hay to Powell, Sept. 2, 1899.

²For. Rel., 1905, pp. 552-53. Pierce to Powell, June 24 and June 25, 1905.

save innocent human life."¹

Following a revolution and the overthrow of the Costa Rican Government in January 1917, President Gonzales and other members of the government sought asylum in the American Legation. When Minister Hale reported to the State Department, he noted that the refugees had obtained shelter during his absence because of illness; but that he had since permitted them to remain. He felt such action was warranted since the situation appeared the reverse of the conditions "described in 51, instructions to diplomatic officers; it was the government which sought asylum." He also reported that he had arranged for safe-conduct out of the country for the refugees.²

The United States at this time appeared to be much more interested in returning the Gonzales Government to power, and there is no indication of any State Department comment on the grant of asylum. The silence would seem to indicate approval under the circumstances.

Elections were subsequently held to legitimize the new government, and the political situation appeared to stabilize. But some months later increasing dissatisfaction

¹For. Rel., 1911, 285. Furniss to Knox, Aug. 1, and Knox to Furniss, Aug. 2, 1911.

²For. Rel., 1917, 305. Hale to Lansing, Feb. 3, 1917.

with the new regime caused martial law to be proclaimed, and ex-President Gonzalez, his family and some members of his government again sought asylum in the American Legation.¹ The Chargé was instructed by the State Department to attempt informally to get safe-conducts out of the country for the refugees.² When the desired assurances had been received, the refugees left the embassy.³

Honduras in 1919 was the scene of a reign of terror following a coup d'état that set up a dictatorship. The United States legation, among others, offered asylum to political refugees.⁴ Minister Jones, in a despatch to the Department telling of prevailing conditions, stated:

It was at this time and under these conditions, believing as I did, that these brutalities were purely political, that the parties were in great bodily danger and that at the outbreak of any form of disorder in the shape of resistance, they would be assassinated, I permitted five gentlemen, among them two congressmen, to remain in the Legation, after they had rushed here, without my knowledge or consent. I have kept them strictly away from outside communication and have granted no privileges to communicate, except with their

¹Ibid., p. 323. Johnson to Lansing, May 17, 1917.

²Ibid., p. 325. Lansing to Johnson, May 24, 1917.

³Ibid., Johnson to Lansing, May 25, 1917.

⁴For. Rel., 1919, II, 377. Jones to Lansing, July 18, 1919.

immediate families. . . .¹

In later despatches Jones informed the Department that Honduras recognized the right of asylum, that the government had been informed of the refugees' presence in the embassy and that their safe departure had been permitted.² The action of the minister was approved by the Department, but he was cautioned not to interfere in internal affairs.³

On being informed that asylum had been granted to a Venezuelan political refugee in Caracas in 1924, the Department admonished the Chargé, Chabot, that:

It is contrary to the policy of this Government to approve of granting asylum to political refugees, although in some cases the Department has approved of . . . giving temporary shelter, for humanitarian reasons, to political refugees in imminent peril of their lives. Under the circumstances the Department does not consider that the action . . . in the case mentioned was warranted.⁴

A similar case arising in Guatemala in 1930 brought a reiteration of the same sentiments from the Department of State. The Second Secretary of the Embassy was informed

¹Hackworth, Digest, II, 626-27. Hackworth cites Jones to Lansing, no. 255, July 21, 1919, file, 815.00/1919.

²For. Rel., 1919, II, 381, 385. Jones to Lansing, July 25 and Sept. 9, 1919.

³Ibid., p. 379. Acting Secretary of State Phillips to Jones, July 20, 1919.

⁴Hackworth, Digest, II, 627-28. Hackworth cites Secretary Hughes to Chabot, no. 852, Apr. 19, 1924, file 832.00/1226.

that the man might remain in asylum until his life was no longer in danger, but asylum should be terminated as soon as the existing conditions had ceased.¹

It appears from the preceding survey that dictates of humanity have been the guiding light for the State Department and its representatives in foreign countries. The Department, however, has not always been in agreement with its diplomats that claims based on humanitarian reasons have been sufficiently pressing. Where there was any doubt, or any question of interference in internal matters, policy statements emphasized great caution in the granting of legation asylum.

Conclusion

In the preceding examination of asylum cases, one attitude was significantly conspicuous--a desire to keep out of trouble. In addition, the United States, ever proud and jealous of its sovereign independence, has not been unaware of similar feelings in the Latin American nations. Unwilling to have her own sovereignty infringed upon in any way, the United States has hesitated to take action that would abrogate the sovereignty of other nations. But as international incidents do not occur alone in a vacuum,

¹For. Rel., 1930, III, 174. Stimson to McCafferty, Dec. 13, 1930.

neither do motives appear singly by themselves.

A secondary but most important motivating factor has been a facet of this nation's ideals: a high regard for human rights and human life. The domestic and foreign policies of the United States have not always been exemplary or consistent in regard to this and other ideals; nevertheless, such ideals as life and liberty for all mankind cannot be divorced from policy considerations.

It is primarily to this dichotomy of foreign policy motivations that the equivocal attitude of the United States in regard to legation asylum can be attributed. The United States has refused to accede to any international rule which would effectively deny the sovereignty of a nation as a right of asylum unquestionably does; but as a nation founded on high ideals, considerations of humanity have mitigated policy to take into account unusual conditions. Frequent revolutions in the Latin American republics, and the absence of impartial law and order in other nations, have caused the United States to permit its embassies and consulates to offer asylum. But the practice has been limited as much as possible, and confined to those nations which have permitted the practice through custom or treaty rights. Yet whether or not the United States has chosen to open its legation doors to refugees, it has also always claimed the right to do so if that right was

permitted to other nations.

Other more minor considerations have also influenced attitudes toward granting asylum. Not the least of these have been the abuses to which asylum may be put. Political dissidents have undoubtedly been more inspired to rebel in the knowledge of a ready-made haven should they fail. Moreover, once within the safety of the diplomatic residence, rebels have been able to conduct successful revolutions. Another factor has been the adverse effect on the successful prosecution of the diplomatic mission. Resentment over, perhaps, such a minor matter as a legate state harboring a person or persons wanted by a receiving state, cannot help but make negotiations on major issues more difficult. Less important, but also worthy of consideration, has been the necessary expense incurred for the upkeep of the refugees, plus the necessary utilization and consequent limitation of diplomatic facilities for non-diplomatic purposes.

With all these considerations in mind, the United States in the past attempted to limit diplomatic asylum to temporary refuge from immediate danger to life. A new world situation has brought about a revision of this former policy.

CHAPTER IV

UNITED STATES POLICY AND PRACTICE SINCE 1945

Introduction

While sentiments of humanity still remain a primary cause for the United States Legations to grant asylum, a new factor has been added since the end of World War II-- the granting of asylum for propaganda and information purposes. Again, as has happened so often in the past, practice has preceded and outdistanced theory.

As the preceding chapter pointed out, prior to 1945, American opinion had maintained that the doctrine of a right of asylum had no standing in international law; that the usage of asylum was a practice to be restricted to "backward" countries which lacked means for effective law enforcement, and was to be limited to pressing humanitarian considerations; i.e., a temporary grant of shelter to potential victims of mob violence. A grant of asylum was never to interfere with the enforcement of law and order by legitimate government agents.

Since 1945 practice has changed, but the former position has remained the same. The United States in various conferences has still refused to accept the

practice of legation asylum as having any legality under international law. Yet in several instances the United States has granted asylum without "a motive of temporary refuge from mob violence" being in evidence. Such practice would seem to indicate a departure from tradition. This chapter will examine this new practice in the light of those few cases available.

Policy Since 1945

The potential value of defectors for propaganda, information, and research activities has been sadly overlooked or disregarded in the past. In many cases Iron Curtain refugees received such indifferent treatment in the bewildering "free world," that like the Soviet Air Force flier, Anatole Barsev, who risked his life to flee to the West, they have been willing to return to their homelands despite probable punishment.¹

As a consequence, in 1951, the United States High Commissioner in Germany, John J. McCloy, announced a new policy with a marked shift in emphasis. The Soviet Union was bluntly informed that "the United States would not return political refugees to the Soviet Union or its satellites where their lives and freedom were in

¹New York Times, April 25, 1951, p. 14.

jeopardy."¹ The reception and treatment of defectors from Iron Curtain countries would, in the future, receive maximum attention and a new organization of experienced workers would handle the refugees.²

The State Department followed this up by announcing the following day that the Voice of America would stress in its broadcasts in Eastern Europe the policy of asylum for Soviet political refugees as set forth by McCloy.³

Yet in regard to the question of legation asylum, United States policy has remained, officially, the same as in the past. Thus at the Tenth Inter-American Conference at Caracas which presented two conventions for signature--a Convention on Diplomatic Asylum and a Convention on Territorial Asylum--the United States refused to sign either instrument. Refusal to sign the former was based on traditional grounds and the latter on the basis that the subject was so well established that no treaty was needed.⁴

The problem of diplomatic intercourse and immunities was considered of sufficient importance, however, to

¹Ibid.

²Ibid.

³Ibid., April 26, 1951, p. 9.

⁴William G. Bowdler, "Report on the Tenth Inter-American Conference," Department of State Bulletin, III (April 26, 1954), p. 635.

be placed on the list of items for codification by the International Law Commission. When a draft convention came up for discussion, there was some disagreement as to whether the Commission would deal also with the right of asylum. Mr. Edmonds, the American representative, agreed with several others that the question of the right of asylum was separate and should be dealt with separately. Any attempt to formulate exceptions to the principle of inviolability of the embassy in an article, he felt, would give the subject a standing to which it was not entitled.¹

Practice Since 1945

Generally speaking, in 1945, the United States held in high regard the Russian people and army which had done such a magnificent job of driving the Germans out of Russia and back into their own country. The subsequent actions of the Russian army, therefore, as it liberated those countries which are now Soviet satellites, proved disillusioning. While official pronouncements from Moscow maintained that free elections and democratic governments would be permitted in Russian occupied countries, the Russian army was supporting the setting up of Communist

¹United Nations, "Summary Records of Ninth Session: Diplomatic Intercourse and Immunities," Yearbook of the International Law Commission (A/CN.4/Ser. A, May 9, 1957) (New York, 1957), I, p. 55.

dominated governments in complete disregard of the desires of the majority of the liberated people.

The Agrarian Party was the most important political group in Bulgaria in 1945, a pro-Allied party dedicated to democratic ideals. In January, shortly after the Russian occupation, the local Communists insisted that the Secretary General of the Agrarian Party, Dr. G. M. Dimitroff, be dismissed because they could not work with him. The Russian occupation authorities backed the Communists and informed the Agrarians that Dimitroff would have to go.¹

Placed under house arrest, he subsequently escaped and sought asylum with the United States political representative at Sofia, Mr. Maynard Barnes. On June 2, Acting Secretary of State Grew told the press that Barnes had given asylum to Dimitroff at four o'clock in the morning of May 24, on the grounds "that his life was in immediate danger from irresponsible elements. . . ." Grew further emphasized that Dimitroff represented "a large democratic element, with a long and honorable record of loyalty to democratic principles and the Allied cause."²

¹New York Times, January 16, 1945, p. 5.

²Department of State Bulletin, XII, no. 310 (June 3, 1945), p. 1023. See also "The Hunted," Time, June 11, 1945, p. 36.

Barnes immediately informed the Bulgarian authorities and sought to be relieved of Dimitroff's custody, if he could be assured that Dimitroff would receive effective protection from physical violence and the legal rights to which he was entitled.¹ While Moscow demanded the immediate release of Dimitroff, the matter was discussed with the Prime Minister and Minister for Foreign Affairs of the Communist-dominated Bulgarian Government. Finally, on September 5, Dimitroff and his wife were given Bulgarian passports with Russian approval, and accompanied by Barnes, left for Italy aboard an American plane. The action of Barnes was entirely approved and backed up by the United States State Department.²

The most notable and extensive case of asylum involving the United States is that of Cardinal Mindszenty. In February, 1949, after a mock trial that lasted only five days, the Roman Catholic Primate of Hungary, Joseph Cardinal Mindszenty was sentenced to life imprisonment. After he had been brainwashed, a Communist-dominated "people's" tribunal in Budapest found him guilty of treason, violation of the country's currency laws, and disloyalty to the government. During the following seven

¹Department of State Bulletin, p. 1023.

²New York Times, September 6, 1945, p. 8.

years of his imprisonment, his mother was to be his only visitor, and then only on a dozen occasions.¹

Over the course of these years the Hungarian people were growing more and more restive under the Communist yoke. While he remained in Hungary, the Cardinal was a living symbol of Communist oppression as the unrest began to come to a head. Offered his freedom if he would leave Hungary and go to Rome, he refused; offered his freedom, then, if he would merely promise not to speak or preach in public, he again refused.²

Beginning with a peaceful demonstration on October 23, 1956, which was fired upon by Hungarian security police, the Hungarian people spontaneously rose in revolt against the Communist system. On October 30, Cardinal Mindszenty was released from prison by Hungarian revolutionary troops.³ Following what appeared to be a partial victory in expelling the Russians, Soviet tanks and troops on November 2 began to pour back into Hungary and surrounded Budapest. The nationwide strike to support the demand for Soviet withdrawal and the Cardinal's appeals

¹Ibid., October 31, 1956, p. 22.

²Ibid.

³Richard P. Stebbins, The United States in World Affairs 1956 (Council on Foreign Relations; New York: Harper and Brothers, 1957), p. 315.

to the West for political support against the Russians were fruitless.¹

On November 4, Soviet troops started their attack against Budapest and other Hungarian cities, towns and military installations. The Hungarian people continued fighting although against hopeless odds. On this same day, Cardinal Mindszenty took refuge in the United States Legation,² where he has remained up to this time a virtual prisoner.³ Kirchheimer has pointed out that:

Hungary's failure to take action against the Cardinal's being sheltered by the United States Embassy indicated tactical choice rather than recognition of the principle of diplomatic asylum. In the analogous case of the unfortunate members of the Nagy government who had taken refuge in the Yugoslav Embassy, the Hungarian government (and its Soviet protectors) obtained the fugitive's surrender against the express promise of non-prosecution and safe conduct, which was immediately broken.⁴

But the grant of asylum by the United States also indicates a tactical choice which departs considerably from the past attitude of the United States.

In June of 1959, again in contradiction to traditional practice, the United States Embassy in Rangoon,

¹New York Times, November 3, 1956, p. 17.

²Ibid., November 4, 1956, p. 1.

³Otto Kirchheimer, "Asylum," American Political Science Review, LIII (December, 1959), p. 1004.

⁴Ibid., p. 1004 n.

Burma, gave asylum to a young Soviet diplomat who merely stated that he desired "a life of freedom." The Russian, Aleksander Urevitch Kaznacheev, was the information officer in the Soviet Embassy in Rangoon.¹ As soon as he had been granted refuge, Kaznacheev declared in a written statement:

I have decided on my own free will to leave my former life and responsibilities. I desire a life of freedom which is not possible for a citizen of the U. S. S. R. and request asylum.

I hate the regime that is presently ruling the Soviet Union. The Soviet Government uses terror, subversion and police state methods to achieve its aims.

I believe that communism is evil because it deprives individual man of his pride and self-respect. Communism reduces man to a subhuman level, where he is a slave of the party and its ruling masters.

Since I have been in Burma I have been forced by my superiors in the Soviet Embassy to spy on my fellow Russians as well as on my Burmese friends. I love the Russian people but I hate the Government of the Soviet Union and its cruel intelligence services which oppress the Russian people.
...²

In addition to the propaganda value of his statement, Kaznacheev also had valuable information to give. At a news conference he promised to expose the Communist spy network in Burma. "The main occupation of all the Soviet

¹New York Times, June 27, 1959, p. 2.

²Ibid.

Embassy staff [in Rangoon] is to spy," he said, and the Soviet Embassy and Chinese Communist Embassy "are acting very closely together in their subversive activities in Burma, but my personal opinion is that the main role is played by Communist China."¹

The American Ambassador, McConaughy, informed the Burmese Foreign Minister of the presence of the Soviet official in the Embassy and of the plans that were being made to fly him out of the country.² In reply, the Burmese Government said that it "does not recognize the right of any embassy or legation in Rangoon to afford asylum, which covers protection . . . [and therefore] the current position of Kaznacheev in the American Embassy is being considered."³

Subsequently, Kaznacheev was taken from the United States Embassy by McConaughy and turned over to the Burmese Foreign Ministry for questioning. The Soviet Ambassador was offered the opportunity to question Kaznacheev at this time, but did not take advantage of the offer. After questioning, the Foreign Ministry stated that Kaznacheev "left the Soviet Embassy of his own free will," and he was told

¹Ibid., June 28, 1959, p. 15.

²Ibid., June 27, 1959, p. 2.

³Ibid., June 28, 1959, p. 15.

he could go where he chose.¹ On June 29, he was flown out of Rangoon aboard a United States Air Force plane bound for an undisclosed destination.²

Conclusion

Each of the three cases demonstrates a more decisive break with tradition. The first case, involving Dimitroff, while including elements of humanitarian motivation, pertinently stressed the incipient ideological war to come. In the Mindzenty case, similar humanitarian factors existed, but more to the point was the fact that Cardinal Mindzenty symbolized the Western ideal of freedom and democracy as opposed to the Russian-imposed oppression. In the last case there was no question of refuge given on a temporary basis to prevent arbitrary action by the government. The decision to grant asylum appears to have been based solely on the value of the propaganda and the information that could be obtained.

¹Ibid., June 30, 1959, p. 17.

²Ibid.

CHAPTER V

CONCLUSION

It has been seen how the practice of asylum began, how it changed from a religious to a political institution, and how it changed in regard to the type of refugee who could acceptably be sheltered. Throughout history the granting of asylum, first in sacred places and later in diplomatic residences, although for the most part permitted, has met with opposition, and at times, violation. Because the right of legation asylum is a derogation of state sovereignty, and because its practice has at times fostered political conspiracies, the majority of modern states have rejected the use of legation asylum. Yet despite the changing patterns of international relations and the vicissitudes of history, the institution has managed to survive, and with it, the problems that have proceeded from it.

What position does the right of legation asylum hold in international law today, and what is the future outlook for it? Morgenstern cites Salamanca as stating that the law of diplomatic asylum is an accepted part of general international law governing the Latin American

nations.¹ But she points out that the Pan-American Conferences which have attempted by means of treaties to make the right of asylum a universally recognized principle of international law "have not changed the legal position of the right of asylum materially in practice."² She bases this conclusion on the fact that only on the American continent have there been any conventions signed on the subject. In addition, the only convention imposing a direct obligation on the parties to respect the right of asylum was signed in 1889 and binds only five countries.³ The 1889 treaty was supplemented by a treaty signed in 1939 by the same five countries and Chile. On the basis of this limited circle of American States, Morgens tern goes on to say:

Thus it is hardly accurate to speak of the creation of regional international law on diplomatic asylum by means of treaties, and it seems very doubtful whether states, even in America, are prepared to give the subject a firm basis of conventional law.⁴

The United States has attempted to formulate a doctrine of asylum whereby diplomatic representatives would

¹Felice Morgens tern, "Extra-Territorial' Asylum," BYIL, XIV (1948), 240.

²Ibid.

³Argentina, Bolivia, Paraguay, Peru, and Uruguay.

⁴Morgens tern, p. 241.

be called upon to act only in periods of general lawlessness, but it has found itself unable to abide by such a limited doctrine. The present position of legation asylum is certainly unsatisfactory. The claims of humanitarianism and of state sovereignty are often irreconcilable. Diplomatic representatives have on numerous occasions described the responsibility, inconvenience, and trouble resulting from the practice. In addition, the representatives of other states are not the most suitable persons to protect the human rights of the subjects of the state to which they are accredited.

Since the founding of the United Nations, a great deal of effort has been expended on the clarification and promotion of this question of human rights. McDougal and Leighton believe human rights to be the "main core" of the objectives of the United Nations, and, for that matter, all democratic governments.¹

The solidification of the sovereign state system has reduced the value of the individual human being. Global distances have shrunk, and governments and movements steeped in, or at best not impervious to, violence have multiplied. Kirchheimer remarks that governments have

¹Myres S. McDougal and Gertrude C. K. Leighton, "The Rights of man in the World Community: Constitutional Illusions versus Rational Action," Law and Contemporary Problems, XIV, no. 3 (1949), p. 508.

tended "ever more to shape their political and social systems with a minimum of interference from the human material with which they deal."¹ Even on the generally accepted question of territorial asylum there are problems. He points out that:

The recent discussion (March 23-25, 1952) in the Commission of Human Rights of the United Nations' Economic and Social Council, geared towards eventual production of a U. N. draft of asylum principles, bears evidence that even as ambiguous a formula as "every person whose life, physical integrity or liberty is threatened, in violation of the principles of the Universal Declaration of Human Rights, shall be regarded as entitled to seek asylum," would encounter resistance.²

The Director of the Division of Human Rights, John P. Humphrey, stated in 1948 that what the Commission was proposing constituted an intervention in matters previously "within the domestic jurisdiction" of the member states.³ He wrote:

What the United Nations is trying to do is revolutionary in character. Human rights are largely a matter of relationships between the state and individuals, and therefore a matter which has been traditionally regarded as being within the domestic jurisdiction of states. What is now being proposed is, in effect, the creation of some kind of a supernational supervision of this relationship

¹Kirchheimer, p. 986.

²Ibid., p. 990.

³John P. Humphrey, "International Protection of Human Rights," The Annals of the American Academy of Political and Social Science, CCLV, no. 1 (1948), p. 15.

between the state and its citizens.¹

The problems of asylum definitely point to the necessity of finding a more suitable machinery of international supervision. Recognizing the right of legation asylum in international law and strictly specifying its use and conditions would no doubt help eliminate the abuses it has been subject to in the past. But as in the past, various factors are at work which make such a possibility seem unlikely of being soon accomplished.

The very violence of which the modern state is capable points up the need of asylum. Yet such violence is indicative of a trend by governments to act obversely --to deny a right of asylum. Thus Kirchheimer says in regard to the Haya de la Torre case:

It might well be that the more South and Central American upheavals deviate in the future from the previous pattern of narrow changes in political and military elites and edge closer toward becoming the expression of social revolutionary or, as the case may be, counter-revolutionary movements, the more the still prevailing practices of diplomatic asylum will become controversial. The larger the number of people actively engaged in the overthrow of the previous regime, the more likely that the rational interest of new political elites in their future security will recede behind the irresistible urge to eradicate the remnants of the old regime, a pattern which would necessarily involve a drastic curtailment of the usages of diplomatic asylum.²

¹Ibid., p. 21.

²Kirchheimer, p. 1004.

On the other hand, large nations such as the United States have indicated a change of heart in regard to the practice. Because the United States is opposed to certain social movements, it is easy to see how United States policy would find the right of legation asylum beneficial in its fight against such revolutionary movements. While so far "legal concretization and limitation of diplomatic asylum have not materialized," Kirchheimer says, he believes that the institution of asylum is gaining in importance.¹

Situated at the nexus of national and international law, self-interest and compassion, the question of diplomatic asylum will remain an unsolved problem until nations ultimately evince sufficient interest in the welfare of the individual to cause the law of nations to restrict the freedom of States in their treatment of individuals.

¹Ibid., p. 986.

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BIOGRAPHICAL SKETCH

Richard Allen Frederick was born on January 23, 1933, in Cleveland, Ohio. After graduating from Shaker Heights High School in 1951, he attended Case Institute of Technology for one semester. In May of 1952, he entered the United States Marine Corps, where he served three and one-half years. Following his discharge, he entered the University of Florida in February, 1956, and received his Bachelor of Arts in Political Science in February, 1959. He is a member of Pi Sigma Alpha, honorary political science fraternity.

This thesis was prepared under the direction of the chairman of the candidate's supervisory committee and has been approved by all members of that committee. It was submitted to the Dean of the College of Arts and Sciences and to the Graduate Council, and was approved as partial fulfillment of the requirements for the degree of Master of Arts.

June, 1960

J. H. Gosh
Dean, College of Arts and
Sciences

Dean, Graduate School

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